(22,303)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 127.

A. C. CRENSHAW, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 TRANSCRIPT.

Caption.

STATE OF ARKANSAS, Plaintiff,
VS.
A. C. CRENSHAW, Defendant.

Pleas Before J. P. Tatum, Justice of the Peace of El Dorado Township, Union County, and Pleas Before Hon. Geo. W. Hays, Circuit Judge of the 13th Judicial Circuit.

2 *Warrant of Arrest.*

The State of Arkansas to any Sheriff, Constable, Coroner, or Policeman, in this State:

It appearing that there are reasonable grounds for believing that A. C. Crenshaw has committed the offense of Peddling or Selling Steel Stove Ranges Without License in the County of Union; you are therefore commanded forthwith to arrest him and bring him before me, to be dealt with according to law.

Given under my hand as Justice of the Peace for Union County, this 27th day of Nov. 1909.

J. P. TATUM,
Justice of the Peace.

Summons as witness- for the State.

—— ——.
—— ——.
—— ——

(Endorsed on Back:) No. —. Justice's Court, El Dorado Township, —— County. State of Arkansas versus A. C. Crenshaw.

STATE OF ARKANSAS,
County of Union:

I have this 26 day of Nov. A. D. 1909 duly served the within by arresting the within named A. C. Crenshaw, and have his Bond now in Court as therein commanded.

Fees.

Services	$1.00
Mileage and Ferriage	.10
Attending Court and Guarding Prisoner	
Return and Bond	.60
Commitment	
Mileage on Commitment	
Summoning — Witnesses	
Total	$1.70

J. N. HARMAN, *Sheriff.*

Filed this 29 day of Nov., A. D. 1909. J. P. Tatum, Justice of the Peace.

Filed Jan'y 21st, 1910. O. A. Miles, Clerk.

3 *Bail Bond.*

STATE OF ARKANSAS,
County of Union:

A. C. Crenshaw being in custody, charged with the offense of Peddling or Selling Steel Stove Ranges and being permitted to give bail in the sum of Two Hundred Dollars, now we, A. C. Crenshaw, Principal, and G. E. Slade, sureties, hereby undertake that the above named A. C. Crenshaw shall appear in the Union County Circuit Court, on the first day of its next 3 day Dec. Term, 1909, to answer said charge, and shall at all times render himself amenable to the order and process of said Court, in the prosecution of said charge, and if convicted shall render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay the State of Arkansas the sum of $200.00.

A. C. CRENSHAW. [L. S.]
G. E. SLADE. [L. S.]

G. E. Slade upon his oath say- that he is a citizen of the State of Arkansas, and is worth the sum of $200.00 *Dollars* in property situate in said State over and above his just debts, liabilities and exemptions and subject to execution.

G. E. SLADE. [L. S.]

Subscribed and sworn to before me this 29 day of Nov. 1909.

J. W. HARMAN, *Sheriff.*

Filed Jan'y 21st, 1910.

O. A. MILES, *Clerk.*

4 *Transcript of J. P. Tatum, J. P. Docket.*

STATE OF ARKANSAS, Plaintiff,
vs.
A. C. CRENSHAW, Defendant.

Selling Stoves Without License.

Transcript J. P. Court.

On March 26th, 1909, J. Y. Stevens, Prosecuting Attorney, filed bill of information charging defendant with selling stoves without license, in Union County.

Thereupon a warrant of arrest was issued and the defendant was arrested and placed under bond. On December the 2nd the Court was duly in session with all parties, and by counsel this cause was

submitted to the Court upon question of law, the facts in the same having been agreed to.

The Court after hearing the argument of counsel is of the opinion that the defendant is guilty as charged in the bill of information and as a punishment upon him impose- a fine of Two Hundred Dollars.

Notice of appeal given and affidavit and bond filed.

Given under my hand Dec. 2nd, 1909.

J. P. TATUM, *J. P.*

Fees.

J. P. Tatum, J. P.	$4.05
J. W. Harman, Sh'ft	13.60
J. Y. Stevens	10.00
Of Witnesses	3.50
	$31.15

Endorsement: Filed Jan'y 21st, 1910. O. A. Miles, Clerk.

5 In the Justice Court, El Dorado Township, Union County, Arkansas.

Before J. P. Tatum, Justice of the Peace.

THE STATE OF ARKANSAS, Plaintiff,
vs.
A. C. CRENSHAW, Defendant.

The defendant, A. C. Crenshaw, having appealed from a judgment rendered against him by J. P. Tatum, Justice of the Peace of El Dorado Township, Union County, Arkansas, on the 3rd day of December, 1909, for a fine of Two Hundred Dollars and costs upon a charge of peddling and selling Steel Ranges in Union County, Arkansas, without first having procured a license. We acknowledge ourselves to owe and be indebted to the State of Arkansas in the sum of Four Hundred and Ten ($410.00) dollars conditioned that the said defendant, A. C. Crenshaw, shall appear in the Union Circuit Court at the next March Term, A. D. 1910, and submit himself to the jurisdiction thereof and not depart therefrom without leave of said Court.

Given under our hands this 3rd day of December, 1909.

A. C. CRENSHAW.
J. J. HUDSON.
W. M. BELLOTT.

STATE OF ARKANSAS,
County of Union:

W. M. Bellott and J. J. Hudson state on oath that they each have and own property in Union County, Arkansas, subject to execution, over and above their debts and liabilities in the sum of

four hundred and ten Dollars, over and above their legal exemptions.

J. J. HUDSON.
W. M. BELLOTT.

Subscribed and sworn to before me this the 3rd day of December, A. D. 1909.

J. W. HARMON, *Sheriff.*

Endorsement: Filed Jan'y 21st, 1910. O. A. Miles, Clerk.

6 *Record Entries.*

March Term, 1910, 1st Day.

STATE OF ARKANSAS,
County of Union:

MONDAY, *March* 21*st*, 1910.

At a regular term of the Circuit Court of Union County begun and held at the Court house in the Town of El Dorado on the 21st day of March, 1910, the same being the 3rd Monday in March and the time prescribed by law for holding said Court, present and presiding Hon. G. W. Hays, Judge of the 13th Judicial Circuit, which includes the said County of Union, Court was duly opened and the following proceedings were had to-wit:

It is ordered that Court adjourn until tomorrow morning at 8:30 o'clock.

G. W. HAYS,
Judge 13th Judicial Circuit.

7 March Term, 1910, 16th Day.

THURSDAY, *May* 12*th*, 1910.

Court met pursuant to adjournment, present and presiding Hon. G. W. Hays, Judge 13th Judicial Circuit. Court was duly opened and the following proceedings were had to-wit:

#927.

STATE OF ARKANSAS
VS.
A. C. CRENSHAW.

Appeal. Cause Submitted to the Court by Consent upon Agreed Statement of Facts and Declaration of Law and Court Finds Defendant Guilty and Fixes His Punishment at a Fine of $200.00. Motion for New Trial Filed. Overruled. Defendant Excepts and Prays an Appeal to the Supreme Court. Granted and Defendant Allowed 20 Days to File His Bill of Exceptions Herein, and Defendant Permitted to Give $300.00 Bond.

Comes States of Arkansas by J. Y. Stevens, Prosecuting Attorney, comes also defendant, A. C. Crenshaw in person and by attorney and

on motion and by consent of both sides a jury is hereby waived and this cause submitted to the court sitting as a jury.

The Court after hearing the testimony in the case and being fully advised in the premises finds the defendant guilty as charged herein and fixes his punishment at a fine of Two Hundred Dollars.

It is therefore considered, ordered and adjudged by the Court that the State of Arkansas have and recover of and from the defendant A. C. Crenshaw the sum of T[illegible]undred Dollars fine together with all cost herein expended.

Wherefore defendant by his attorney files his motion for a new trial of this cause, which motion is taken up, argued and submitted to the court and by the court overruled to which ruling of the court defendant excepts and asks that his exceptions be noted of record which is accordingly done, and prays an appeal to the Supreme Court of Arkansas, which appeal is by the court granted and it is ordered

by the court that the defendant be allowed (20) Twenty days
8 in which to file his bill of exceptions herein.

And it is further ordered by the court that the defendant be permitted to enter into bond in the sum of ($300.00) Three Hundred Dollars pending said appeal.

9 The Court finds the facts as follows:

Findings of Fact.

"The Court finds that the defendant was engaged as Agent of the Wrought Iron Range Company in taking orders for articles of commerce moving between the States of Missouri and Arkansas, and that the character of ranges, as articles of commerce between the States, was not changed from the time the orders were taken to the time of delivery to the purchaser."

The Court declared the law as follows:

Refused.

1. That Act No. 97 of the Legislature of Arkansas, approved April 1st, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their Agent is in violation of Section 8, Art. 1, of the Constitution of the United States, and in so far as it does apply is void.

Refused.

11. That the said Act No. 97 denies to Citizens of other States all the privileges and immunities granted to Citizens of Arkansas, and is void because violative of Sec. 2, Art. 4, of the Constitution of the United States.

Refused.

III. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the 14th Amendment to the Constitution of the United States, and of Sec. 18, Art 2, of the Constitution of Arkansas.

Refused.

IV. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each County in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

Refused.

V. That the Tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not uniform, and void as being in violation of Section 5, Art. XVI, of the Constitution of Arkansas.

Refused.

VI. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense.

Endorsement: Filed May 12th, 1910. O. A. Miles, Clerk.

In the Union Circuit Court, March Term, 1910.

STATE OF ARKANSAS, Plaintiff,
vs.
A. C. CRENSHAW, Defendant.

Motion for New Trial.

Comes the defendant and moves the court to grant him a new trial herein and for cause says:

1st. The Court erred in not finding the facts as requested by defendant as follows:

"The court finds that the defendant was engaged as Agent of the Wrought Iron Range Company in taking orders for Articles of Commerce moving between the States of Missouri and Arkansas and that the character of the ranges, as articles of commerce between the States, was not changed from the time the orders were taken to the time of the delivery to the purchaser."

2nd. The court erred in refusing declaration in law No. 1, requested by the defendant.

3rd. The court erred in refusing declaration in law No. 2, requested by defendant.

4th. The court erred in refusing declaration No. 3, asked by the defendant.

5th. The court erred in refusing declaration of law No. 4, as requested by the defendant.

6th. The court erred in refusing declaration of Law No. 5, requested by defendant.

7th. The court erred in refusing declaration of Law No. 6, requested by the defendant.

8th. The judgment of the court is not sustained by the
12 evidence as agreed upon in the agreed statement of facts.
9th. The judgment of the court is contrary to the Law.
10th. The judgment of the court is contrary to the Law and the said agreed statement of facts.
Wherefore defendant prays for a new trial and other proper relief.

MARSH & FLENNIKEN,
MOORE, SMITH & MOORE,
Attorneys for Defendant.

Endorsement: Filed May 12th, 1910. O. A. Miles, Clerk.

13 In the Union Circuit Court.

STATE OF ARKANSAS, Plaintiff,
vs.
A. C. CRENSHAW, Defendant.

Bond.

The defendant, A. C. Crenshaw, having prayed and been granted an appeal to the Supreme Court from the judgment of the Union Circuit Court rendered herein against him at its March Term, 1910, for a fine of $200.00 and cost, and being permitted to give bond in the sum of $250.00, now we covenant to and with the plaintiff, the State of Arkansas, that said defendant, upon a final termination of his appeal, will appear and surrender himself in the Union Circuit Court, or if he fails to do so that we will pay to said plaintiff the said sum of $250.00.

Witness our hands this 12th day of May, 1910.

A. C. CRENSHAW.
W. M. BELLOTT.

Endorsement: Filed May 20th, 1910. O. A. Miles, Clerk.

14 In the Union Circuit Court, March Term, 1910.

STATE OF ARKANSAS, Plaintiff,
vs.
A. C. CRENSHAW, Defendant.

Bill of Exceptions.

Be it remembered that on the — day of April, 1910, a regular day of the March Term of the Union Circuit Court, his cause came on for hearing before the Honorable Geo. W. Hays, Circuit Judge presiding, a jury having been waived and the following proceedings were had to-wit:

The cause was submitted on the following agreed statement of facts:

(Clerk here copy agreed statement of facts filed in the cause.)

This was all the evidence in the case.

Thereupon the defendant asked the court to find the facts as follows:

The Court refused to give said findings of facts as requested by the defendant, to which refusal the defendant at the time excepted and had his exceptions noted of record.

Whereupon the defendant asked the court to declare the law as follows:

15 1. That Act No. 97 of the Legislature of Arkansas, approved April 1st, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their Agents, is in violation of Section 8, Art. *i*, of the Constitution of the United States, and in so far as it does apply is void.

II. That the said Act No. 97 denies the citizens of other States all the privileges and immunities to citizens of Arakansas, and is void because violative of Sec. 2, Art. 4, of the Constitution of the United States.

III. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the 14th Amendment to the Constitution of the United States and of Sec. 18, Art. 2, of the Constitution of Arkansas.

IV. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each County in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

V. That the tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not uniform, and void as being in violation of Sec. 5, Art. XVI, of the Constitution of Arkansas.

VI. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense.

The court refused to give each and every one of the above declarations of law, which were separately requested by the defendant and the defendant at the time severally and separately excepted to

16 the refusal of the court to give each of the declarations of law and had its exceptions severally and separately noted of record to the refusal of the court to give each of said declarations of law; and the court of its own motion found the laws as set forth in the agreed statement of facts and upon the same found the defendant guilty and imposed a fine of $200.00, to which judgment of the court the defendant at the time excepted and had his exceptions noted of record.

On the same —, being a regular day of the March Term, 1910, of the Union Circuit Court, the defendant files his motion for new trial which is as follows:

(Clerk here copy motion for new trial.)

And the said motion having been heard by the court was overruled, to which ruling of the court in overruling the motion for new trial, the defendant at the time excepted and had his exceptions noted of record and prayed an appeal to the Supreme Court which was granted; and the defendant now presents this his bill of exceptions and asks that the same be signed by the presiding Judge in *other* that the same may be filed and made a part of the records in this cause, which is accordingly done, this the 12th day of May, 1910.

GEO. W. HAYS,
Circuit Judge of the 13th Judicial Circuit.

Endorsement: Filed May 12th, 1910. O. A. Miles, Clerk.

17 *Certificate.*

STATE OF ARKANSAS,
County of Union:

O. A. Miles, Clerk of the Circuit Court within and for the county and State aforesaid, do hereby certify that the annexed and foregoing 15 pages contain a true and complete transcript of the record entries and all the papers in the above entitled cause as appears from the records and files of this court.

Witness my hand and official seal this 23rd day of May, 1910.

[SEAL.]

O. A. MILES, *Clerk.*

18 *Filing in Sup. Court.*

No. 1484.

A. C. CRENSHAW, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

Transcript.

Filed May 24, 1910.

P. D. ENGLISH, *Clerk,*
By J. H. CAMPBELL, *D. C.*

19 *Certiorari by Appellant.*

STATE OF ARKANSAS:

In the Supreme Court.

The State of Arkansas to the Clerk of the Circuit Court of Union County, Greeting:

Whereas, in a case pending in the Supreme Court of the State of Arkansas, wherein A. C. Crenshaw is appellant and The State of

Arkansas is appellee, it has been suggested by said appellant that there is a diminution of the record filed in this case, in this: The Clerk in making up the transcript of the record in this cause, has copied the agreed statement of facts upon which said cause was tried, which is on file in the office of said Clerk, but omitted to make any reference, at the place where the same was called for in the bill of exceptions, to the page of the transcript where the same could be found, whereby the said agreed statement of facts is not sufficiently identified as the agreed statement of facts so called for in said bill of exceptions with a prayer that the record be amended. You are, therefore, hereby commanded that you certify to our Supreme Court, without delay, a full, true and complete transcript of the record of said circuit court, so as above suggested to be diminished; that our Supreme Court, upon consideration of a complete record, may cause to be done therein what should be done. Hereof fail not and make due return of this writ under your official seal.

In testimony whereof, I, P. D. English, Clerk of the Supreme Court, hereunto set my hand and affix the seal of said Court, at my office in the City of Little Rock, this 20th day of June, 1910.

[SEAL.] P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *D. C.*

20 The following is a correct and true copy of the agreed statement of facts on file in my office in the case of the State of Arkansas against A. C. Crenshaw and named in the Bill of Exceptions filed in said cause with me, and the same is all the testimony that was introduced in the trial of said cause in the Circuit Court of Union County, Arkansas.

Statement of Facts.

The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Missouri, in which City and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other Counties of Arkansas and other States of the United States.

The manner and form in which said Company is conducting its business in Union and other Counties of Arkansas is as follows:

R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a Division Superintendent, has general supervision of said Company's business in Union and other Counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said Company known in its business as sample men or salesmen, and two other employees of said Company known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said Company, and none of said employees has any financial or monetary interest in the property of said Company located in Union County, or in the sales or proceeds of sales made by them in said County or

elsewhere in the State of Arkansas, other than the compensation hereinbefore referred to.

Each of said employees of said Company known as salesmen is furnished by said Company with a sample range, sample
24 wagon and team and is sent into such territory in Union or other Counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said Company fails to deliver the range so ordered within sixty days from date.

All orders so taken by said salesmen are forwarded by them to said Sutton, who investigates the credit of said purchasers and if same is found satisfactory he proceeds to have said orders filled within sixty days' limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said Company hereinbefore referred to as delivery men, each one of whom is furnished with a delivery wagon and team by said Company for such purpose. All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to are the sole and exclusive property of said Company. Under no circumstances do the employees hereinbefore referred to as salesmen sell, or offer to sell or deliver the sample ranges intrusted to them by said Company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges, orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said delivery men, sell or offer to sell or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen.

All ranges so owned and manufactured are shipped in car load lots to Union County and other Counties, each car containing sixty separate and distinct ranges, each car being consigned by said Company to itself in care of said R. L. Sutton, its employee.

A car load of ranges was shipped from St. Louis, Missouri,
22 to El Dorado, Arkansas for the purpose of filling orders previously secured by said soliciting agents or traveling salesman. Upon the arrival of said car at El Dorado the ranges were taken from said car, loaded on said delivery wagon and delivered by said delivery men to said purchasers in the precise shape, condition, form or packages in which they were delivered by said Company to the common carrier at St. Louis, Missouri.

At the end of each month said R. L. Sutton settles with each of said Company's employees hereinbefore referred to as salesmen and delivery men, and sends their report- and his own report to said Company, together with all notes taken by said salesmen for the sale of ranges during the month, and all cash in the hands of said Sutton in excess of $500.00 expense money, which he is allowed to

retain in order to pay the expenses of conducting said Company's business during the following month.

It is further agreed by and between the State of Arkansas through its prosecuting Attorney and the defendants herein that E. L. Ganaway and W. W. Dennis are salesmen of the said Wrought Iron Range Company and have in Union County, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for ranges and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

That A. C. Crenshaw and P. L. Hagler are acting as delivery men in the employ of said Wrought Iron Range Company and have in the manner hereinbefore set forth delivered Ranges to parties in Union County, Arkansas, who had previously given orders to the said above named salesmen, within twelve months before this time.

That all of said persons above named are hired employees of the said Wrought Iron Range Company and have been arrested and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas.

23 A copy of the notes taken by the traveling salesmen above named is hereto attached and made a part of this agreed statement of facts.

J. Y. STEVENS,
Prosecuting Attorney.
MARSH & FLENNIKEN,
Attorneys for Defendants.

Endorsement: Filed Jan'y 21st, 1910. O. A. Miles, Clerk.

$81.00. P. O. ——, State of ——, 190–.

For value received, we, or either of us, promise to pay to Wrought Iron Range Company or order Eighty One Dollars, payable as follows: $40.50 on the first day of Oct., 1910, and $40.50 on the first day of Oct., 1911, without discount or offset, waiving all rights to exemption allowed us by law as to this debt, with interest at six per cent, from date, if not paid when due and presented. This note is given for one "Home Comfort" Range No. —, which —— this day purchased from said Wrought Iron Range Company, to be delivered at —— premises, within sixty days from this date. This note is to be void only upon the condition that the said Wrought Iron Range Company refuse to deliver the said "Home Comfort" Range as above specified, and for no other cause whatever.

Payable .....
County of .....
Witnesses .....

[On left margin.]

To .....
P. O. .....
Rural Route No. .....
Balance Due ..... Mileage .....

24 STATE OF ARKANSAS,
County of Union:

I, O. A. Miles, Clerk of the Circuit Court of said County, do hereby certify that the foregoing pages marked 1, 2 and 3 respectively, contain a full, true and complete copy of the agreed statement of facts upon which the case of State of Arkansas v. A. C. Crenshaw was tried in said court, and is the agreed statement of facts on file in said cause referred to in the bill of exceptions filed by defendant A. C. Crenshaw in said cause.

Witness my hand and seal this 24th day of June, A. D. 1910.

[SEAL.] O. A. MILES,
Circuit Clerk,
By H. G. WILLIAMS, *D. C.*

Endorsed on Back: Agreed statement of Facts in case of State of Arkansas vs. E. L. Ganaway, W. W. Dennis, A. C. Crenshaw, P. L. Hagler. Before J. P. Tatum, J. P., El Dorado Township. Filed 12-3-1909. J. P. Tatum, J. P. Filed Jan'y 21, 1910. O. A. Miles, Clerk.

25 STATE OF ARKANSAS,
County of Union:

I, O. A. Miles, Clerk of the Circuit Court of Union County, hereby certify that I have made out and certified a full, true and complete transcript of the diminution within suggested, which is hereto attached.

In testimony whereof, I hereto set my hand as Clerk and affix the seal of said Circuit Court this 22nd day of June, A. D. 1910.

[SEAL.] O. A. MILES, *Clerk.*

Endorsed on Back: Returned and Filed June 25th, 1910. P. D. English, Clerk, By W. P. Sadler, D. C.

26 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Courthouse, in the city of Little Rock, the following proceedings were had, to-wit: On the 6th day of June, 1910, a day of said term:

A. C. CRENSHAW, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

And

E. L. GANAWAY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

On motion of the Attorney General, leave is granted to brief the above two causes together.

27 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 20th day of June, 1910, a day of said term:

A. C. CRENSHAW, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

On motion this cause is passed for one week to enable the appellant to sue out a writ of certiorari directed to the clerk of the circuit court of Union County, requiring him so to certify up to this court the agreed statement of facts upon which this cause was tried as to properly identify the same as the agreed statement of facts called for in the bill of exceptions.

28 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 27th day of June, 1910, a day of said term:

A. C. CRENSHAW, Appellant,
VS.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

This cause being regularly called, come the parties thereto by their attorneys, and said cause is submitted upon the transcript of the record, and the briefs filed, and by the court taken under advisement.

29 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 11th day of July, 1910, a day of said term:

A. C. CRENSHAW, Appellant,
VS.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

Judgment.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Union County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be and the same is hereby in all things affirmed with costs, and that unless said appellant shall within fifteen juridical days surrender himself to the proper authority in execution of said judgment his bond be declared as forfeited.

It is further adjudged that said appellee recover of said appellant all her costs in this court in this cause expended, and have execution thereof.

Battle & Wood, J. J., dissent.

30 In the Supreme Court of Arkansas, July 11th, 1910.

CRENSHAW and GANAWAY
v.
STATE.

Opinion.

McCULLOCH, *C. J.*:

Appellants were tried before a justice of the peace of Union County and convicted of a charge of violating the peddling statute of 1909, which provides that "before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license," etc. On appeal to the circuit court they were again convicted, and appealed to this court. The case was heard on the following agreed statement of facts: "The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Lous, Mo., in which city and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other counties of Arkansas and other States of the United States.

"The manner and form in which said company is conducting its business in Union and other counties of Arkansas is as follows: R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a division superintendent, has general supervision of said company's business in Union and other counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said company known in the business as sample men or salesmen, and two other employees of said company known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said company, and none of said employees has any financial or monetary interest in the property of said company located in Union County, or in the sales or proceeds of sales made by them in said county or elsewhere in the State of Arkansas, other than compensation hereinbefore referred to.

Each of said employees of said company known as salesman is furnished by said company with a sample range, sample wagon
31 and team, and is sent into such territory in Union or other counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said company fails to deliver the range so ordered within 60 days from date.

"All orders so taken by said salesmen are forwarded by them to the said Sutton, who investigates the credit of said purchasers, and

if same is found satisfactory he proceeds to have said orders filled within 60 days limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said company hereinbefore referred to as deliverymen, each one of whom is furnished with a delivery wagon and team by said company for such purpose.

"All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to, are the sole and exclusive property of said company. Under no circumstances do the employees hereinbefore referred to as salesmen, sell, or offer to sell or deliver, the sample ranges entrusted to them by said company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges, orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said deliverymen sell, or offer to sell, or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen. All ranges so owned and manufactured are shipped in carload lots to Union County, each car containing 60 separate and distinct ranges, each car being consigned by said company to itself, in care of said R. L. Sutton, its employee.

"A carload of ranges was shipped from St. Louis, Mo., to El Dorado, Ark., for the purpose of filling orders previously se-
32 cured by said soliciting agents or traveling salesmen. Upon the arrival of said car at El Dorado the ranges were taken from said car, loaded on said delivery wagons and delivered by said deliverymen to said purchasers in the precise shape, condition, form and packages in which they were delivered by said company to the common carrier at St. Louis, Mo. * * *

"It is further agreed by and between the State of Arkansas, through its prosecuting attorney, and the defendants herein, that E. L. Ganaway and W. W. Dennis are salesmen of the Wrought Iron Range Company, and have in Union County, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders f them and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

"That A C. Crenshaw and P. L. Hadler are acting as deliverymen in the employ of said Wrought Iron Range Company, and have in the manner hereinbefore set forth delivered ranges to parties in Union County, Arkansas, who had previously given orders to the said above named salesmen within twelve months before that time.

"That all of said persons above-named are hired employees of the said Wrought Iron Range Company and have been arrested, and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas." We decided in Ex Parte Byles, 20 Ark. Law Rep. 616, that the statute in question is valid, but it is now insisted that, as applied to the transactions set forth in the statement, it is a burden on interstate commerce, and to that extent void. Appellant Ganaway solicited orders for ranges, and appellant Crenshaw made deliveries thereof after they were ordered and shipped to El Dorado, Ark., for de-

livery to the respective purchasers. They were working under the same employer, and pursuant to a plan whereby one was to solicit orders and the other to deliver the articles sold. So if the two acts constituted an offense when performed by one person, its unlawful character would not be changed when performed by two persons, acting in concert, but both would be guilty.

The statute is directed against peddling, and undertakes to
33 define what constitutes peddling within the meaning of the statute. This definition varies from the common law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words "peddle" and "sell" are used synonymously, but in order to come within the terms of the statute it is essential that a sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be added the element of traveling from place to place, over and through the county, for the purpose of selling, in order for the statute to reach to it. It should also be especially noted that the statute does not discriminate against non-residents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description.

Does the method in which appellants conducted business for their employer exempt them from the operation of the statute? We think not.

The opinion of the Supreme Court of the United States, delivered by Mr. Justice Gray in Emert v. Missouri, 156 U. S. 296, announces the law applicable to the case and sustains the views we express. In that case, the agent of a non-resident manufacturer of sewing machines was engaged in peddling machines in Missouri without obtaining a license as required by the statute of that State. He asserted his right to sell free of license, on the ground that the transaction constituted interstate commerce. All of the prior decisions of that court are reviewed, and the following conclusions announced:

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of
34 the county, appears to have been to protect the citizens of the State against the cheats and frauds, and even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door. * * * The necessary conclusion, upon authority, as well as upon principle is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders."

"It is true, in that case the vendor carried the machines with him from place to place, and made deliveries as he sold them. But we cannot see that that alters the principle, for the legislature has the power to define the act of peddling, and that definition should be upheld by the courts unless it is manifestly evasive.

The other decisions of the Supreme Court of the United States which are relied on by counsel do not conflict with the case above cited. Robbins v. Shelby County Taxing District, 120 U. S. 489, and the line of similar cases in that court, concerned statutes and ordinances imposing license fees on drummers who solicited orders for non-resident merchants, and such legislation was declared to be a burden on interstate commerce. Here, no such burden is imposed, for the license is not demanded merely for soliciting orders, but for peddling.

Leisy v. Hardin, 135 U. S. 100, arose under a statute of Iowa prohibiting the sale of intoxicating liquors without license. That was before the act of Congress known as the Wilson Act, and the court held that the imposition of a license fee on the sale of liquor was a burden on interstate commerce insofar as it applied to imported goods sold in original packages. The present statute, as we have already stated, does not require a license merely to sell, but the license is required to peddle, or sell by traveling from place to place over and through the county.

Caldwell v. North Carolina, 187 U. S. 622, is along the same line, for the ordinance found to be repugnant to the Federal Con-
35 stitution prohibited the sale and delivery of certain wares (pictures and picture frames) in any manner without procuring license.

In Rearick v. Pennsylvania, 203 U. S. 507, the vendor's agent solicited orders for wares to be shipped into the State from Ohio, and the same were by the vendor in that State appropriated to the fulfillment of the contract of sale, and properly tagged and shipped into the State for delivery to the purchaser. In the present case, the ranges were not separately appropriated to the filling of any particular order. The ranges were not separated and tagged with the name of any purchaser, but the appropriation was made by the agent of the vendor after the goods came into the State. Moreover, the court in that case seems to have treated the condemned ordinance as merely requiring a license for the sale of goods, and not as one requiring license for peddling, though the ordinance could be construed as applying only to peddlers or street vendors.

We discover no conflict between that decision and the decision in Emert v. Missouri, supra., which we think announces the law of the present case.

Both appellants were properly convicted, and the judgments against them are affirmed.

Battle and Wood, J. J., dissent.

36 In the Supreme Court of Arkansas, July 14, 1910.

No. 126.

CRENSHAW
v.
STATE OF ARKANSAS.

GANAWAY
v.
STATE OF ARKANSAS.

Dissenting Opinion.

BATTLE, *J.*:

Where property in one State is bargained, sold or exchanged by a citizen or corporation of that State to or with a citizen of another, and in the consummation of such transaction is shipped to the other State to the person to whom it has been bargained, sold or exchanged, and reaches its destination, and becomes a part of the general mass of the property of the State to which it is shipped, it becomes subject to taxation in that State.

It was held in American Steel and Wire Company v. Speed, 192 U. S. 500, that "goods brought in original packages from another State, after they have arrived at their destination and are at rest within the State, and are enjoying the protection which the laws of the State afford, may, without violating the commerce clause of the Constitution, be taxed, without discrimination, like other property within the State. Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622; Emert v. Missouri, 156 U. S. 296.

In Robbins v. Shelby Taxing District, 120 U. S. 489, it is said: "As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held in the case of Brown v. Houston, 114 U. S. 622. When goods are sent from one State to another for sale, or, in consequence of a sale, they become a part of its general property, and amenable to its laws; provided no discrimination be made against them as goods from another State, but only taxed in the usual way as other goods are. Brown v. Houston, qua supra; Machine Co. v. Gage, 100 U. S. 676; But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

37 In Brown v. State of Maryland, 12 Wheaton 419, 441, Mr. Chief Justice Marshall, speaking for the court, said: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps, lost its distinctive character as an import, and has

become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In Leisy v. Hardin, 135 U. S. 100, 110, it is said: "The point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the importer."

In Emert v. Missouri, 156 U. S. 296, 311, cited in the opinion of this court in this case, the goods for to sell which the peddler was required to pay a license, were a part of the general mass of the property of the State. The court said: "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic;
38 and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the occupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

In Brown v. Houston, 114 U. S. 622, 632, 634, it was held: "Coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to taxation under the general laws of that State, although it may be after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port."

In speaking of the tax in that case the court said: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a State of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years. It had become a part of the general mass of

property in the State, and as such it was taxed for the current year, as all other property in the City of New Orleans was taxed. * * * It was subject to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the manner as such goods were treated."

In the same case the court said: "We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of,
39 and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be; and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of Woodruff v. Parham, which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city and in precisely the same manner."

But property in one State, bargained, sold, or exchanged by a citizen or corporation of that State to or with a citizen of another, and in the consummation of that transaction shipped to the other State to be delivered to the person to whom it was bargained, sold or exchanged, while in transit, before it reaches its destination, before it comes to a rest, or becomes a part of the general mass of the property of the State to which it is shipped, is a part of the interstate commerce of the country, and, under the commerce clause of the Constitution of the United States, is subject to the exclusive control of Congress.

In Brennan v. Titusville, 153 U. S. 289, it was held: "An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent, sent by a manufacturer of goods in another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States."

To the same effect it has been held in Robbins v. Shelby
40 Taxing District, 120 U. S. 489, 494; Brown v. Maryland, 12 Wheat. 419, 444; Asher v. Texas, 128 U. S. 129; Stokenbery v. Hennick, 129 U. S. 141; Crutcher v. Kentucky, 141 U. S. 47, 61; Stockard v. Morgan, 185 U. S. 27, 37; Caldwell v. North Carolina, 187 U. S. 622; Reorick v. Pennsylvania, 203 U. S. 507;

Wrought Iron Range Co. v. Campen, 47 S. E. 658; Gunn v. White Sewing Machine Co. 57 Ark. 24.

"The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Robbins v. Shelby Taxing District, 120 U. S. 489, 497.

"It is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." Brennan v. Titusville, 153 U. S. 289, 302; Brown v. Houston, 114 U. S. 622; Leisy v. Hardin, 135 U. S. 100, 109, 113, 114, 123 and 124; Robbins v. Shelby Taxing District, 120 U. S. 489, 493.

In Lyng v. Michigan, 135 U. S. 161, 166, it is said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

The facts in this case are briefly as follows: The Wrought Iron Range Company, a corporation organized under the laws of the State of Missouri, manufactures ranges at its factory in the City of St. Louis, in that State. It has a division superintendent in this State, who looks after and superintends its business in Union and other counties of the State. It has also salesmen and deliverymen.

41 Each of the salesmen is furnished by it with a sample range, sample wagon and team, and is sent into such territory in Union or other counties as may be designated by the division superintendent, to solicit orders for ranges, manufactured by the company, similar to the sample range furnished him. When he secures an order the purchaser executes his not- for the same, which contains an express stipulation that it shall be void in the event the company fails to deliver the range so ordered within sixty days from date, thereby making the order subject to the approval of the company. Such orders are forwarded by the salesmen to the division superintendent, who investigates the credit of the purchaser, and if found satisfactory proceeds to have the order filled within the sixty days. In no case is the salesman allowed to sell the sample range entrusted to him. When the ranges ordered are received they are delivered to the purchasers by the deliverymen. All money and notes, in excess of the amount necessary to pay expenses, are sent by the division superintendent to the company.

The ranges until sold and delivered form no part of the general mass of property of this State; are not subject to the jurisdiction of this State and are not subject to taxation in the same. The solicitations of the salesmen, the orders of the purchasers and the sales of the ranges are transactions between citizens of two States, and are obviously interstate commerce. The requirement by the statute of

April 1, 1909, of the company's employees (if it refers to them) to pay a license fee and to take out a license is a tax on the ranges while subjects of interstate commerce and is a regulation of interstate commerce and as to such persons is of no effect and null and void. Brennan v. Titusville, 153 U. S. 289, 298, 303; Stockard v. Morgan, 185 U. S. 27, 37; Brown v. Maryland, 12 Wheat. 419, 444, 447, 448.

Wood, J., concurs with me in this opinion.

42 *Certificate.*

Supreme Court, State of Arkansas, *ss:*

I, Peyton D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of A. C. Crenshaw, Appellant, vs. The State of Arkansas, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this August 1, 1910.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

43 In the Supreme Court of Arkansas.

No. 1484.

A. C. CRENSHAW, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Assignment of Errors.

Now comes the above appellant and files herewith his petition for writ of error, and says that there are errors in the record of proceedings of the above entitled cause, and for the purposes of having same reviewed in the Supreme Court of the United States, makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, is valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding—

First. That said Act No. 97 of the Legislature of Arkansas, ap-

proved April 1, 1909, as applied to the business conducted by the appellant, and in which he was engaged, and for which he was convicted, is not in violation of Section 8, Article I, of the Constitution of the United States, and that said act is not void in so far as it applies to said business.

Second. That said Act No. 97 does not deny to citizens of other States, and to this appellant as such, all the privileges and immunities granted to citizens of Arkansas, and that it is not void because violative of Section 2, Article IV, of the Constitution of the United States.

Third. That said Act No. 97 does not deny to persons within its jurisdiction the equal protection of the laws, and that it is
44 not void because violative of the 14th Amendment to the Constitution of the United States.

For which errors this appellant prays that the said judgment of the Supreme Court of the State of Arkansas be reversed and a judgment rendered in favor of this appellant, and for costs.

MOORE, SMITH & MOORE,
Attorneys for Appellant.

Filed July 28th, 1910.
PEYTON D. ENGLISH, *Clerk.*

45 In the Supreme Court of Arkansas.

No. 1484.

A. C. CRENSHAW, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court in affirming the judgment against him in the above entitled case, the appellant hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

MOORE, SMITH & MOORE,
Attorneys for Appellant.

STATE OF ARKANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the appellant, A. C. Crenshaw, to the State of Arkansas in the sum of Five hundred Dollars, such bond, when approved, to act as a supersedeas.

Dated July 28th, 1910.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

46

No. 1484.

A. C. CRENSHAW, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Bond.

Know all men by these presents:

That we, A. C. Crenshaw, as principal, and Sam W. Reyburn and C. M. Connor, as sureties, are held and firmly bound unto the State of Arkansas in the sum of Five Hundred Dollars, to be paid to the said State to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 28th day of July, 1910.

Whereas, the above named appellant seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas;

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good his plea, then this obligation be void, otherwise to remain in full force and effect.

A. C. CRENSHAW,
By W. B. SMITH, *Att'y,*
Principal.
SAM W. REYBURN,
CHAS. M. CONNOR,
Sureties.

STATE OF ARKANSAS,
County of Pulaski, ss:

Sam W. Reyburn and C. M. Connor, being each duly sworn, upon oath depose and say: We are each of lawful age and citizens of the State of Arkansas, and know the contents of the foregoing
47 instrument to which we have attached our names. We each severally say that we are worth the sum of One Thousand Dollars in this State over and above all debts, liabilities and exemptions.

SAM W. REYBURN.
CHAS. M. CONNOR.

Subscribed and sworn to before me this the 28th day of July, 1910.

[L. S.] R. M. S. BUTNER,
Notary Public.

Bond approved and to operate as a supersedeas.
Dated this 28 day of July, 1910.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed July 28th A. D. 1910.
PEYTON D. ENGLISH, *Clerk.*

48 UNITED STATES OF AMERICA, ss:

Writ of Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Arkansas and A. C. Crenshaw, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said A. C. Crenshaw, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof,
49 that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Acting Chief Justice of the United States, the 28th day of July, in the year of our Lord One Thousand Nine Hundred and Ten.

[The Seal of the Circuit Court, Western Division, U. S. A., of East Dist., Ark.]

W. P. FIELD,
Clerk of the United States Circuit Court for the Western Division of the Eastern District of Arkansas.

Allowed:

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Service of this writ acknowledged this — day of July, 1910.

HAL L. NORWOOD,
Attorney General, State of Arkansas.

Filed July 28th A. D. 1910.
PEYTON D. ENGLISH, *Clerk.*

50 SUPREME COURT,
State of Arkansas, ss:

Certificate of Lodgement.

I, Peyton D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 29th, 1910, in the matter of A. C. Crenshaw, Appellant, versus The State of Arkansas:

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this August 1, 1910.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

51 No. 1484.

A. C. CRENSHAW, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein A. C. Crenshaw is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 28 day of July, 1910.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Attest:
PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARK., *July 29th*, 1910.

I, Attorney General of the State of Arkansas, appellee in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HAL L. NORWOOD,
Attorney General, State of Arkansas.

Filed July 29th 1910.
PEYTON D. ENGLISH, *Clerk.*

52 UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

Return to Writ of Error.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this August 1, 1910.

[Seal of the Supreme Court of Arkansas.]

PEYTON D ENGLISH,
Clerk Supreme Court of Arkansas.

Costs of Suit.

Transcript to Sup. Court Ark.....	$5.00
J. P. Costs	4.05
Costs Circuit Court.....	27.10

Transcript to U. S. Sup. Court paid by Pl'ff in error $15.50.

Attest:

PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 22,303. Arkansas Supreme Court. Term No. 127. A. C. Crenshaw, plaintiff in error, vs. The State of Arkansas. Filed August 25th, 1910. File No. 22,303.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

No. 127

A. C. CRENSHAW, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

In the year 1909 the General Assembly of Arkansas passed an Act entitled, "An Act to Regulate the Sale of Lightning Rods, Steel Stove Ranges, Clocks, Pumps, Buggies, Carriages and Vehicles in the Several Counties of this State," the Act being approved April 1, 1909. Its text is as follows:

"Section 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any County and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license as hereinafter provided from the County Clerk of such County, authorizing such person to conduct such business.

Sec. 2. That before any person shall travel over or through any County and peddle or sell any of the articles mentioned above, he shall pay into the County Treasury of such County the sum of Two Hundred Dollars ($200), taking the receipt of the Treasurer therefor, which receipt shall state for what purpose the money was paid. The County Clerk of such County upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such County and sell such articles or article for a period of one year from the 1st day of January preceding the date of such license.

Sec. 3. Any person who shall travel over or through any County in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than Two Hundred Dollars ($200) nor more than Five Hundred Dollars ($500).

Sec. 4. That any person who shall travel over or through any County in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this Act.

Sec. 5. All laws and parts of laws in conflict with this Act are hereby repealed, and this Act shall take effect and be in force from and after its passage."

On November 27, 1909, on information by the prosecuting attorney of Union County, a warrant of arrest was issued by J. P. Tatum, a justice of the peace, against plaintiff in error, charging him with the offense of peddling or selling steel stove ranges without the license required by the foregoing statute, and on the same date plaintiff in error was arrested upon the warrant. Shortly after he was found guilty and fined Two Hundred Dollars ($200) by the justice of the peace, an appeal being then taken to the Union Circuit Court. (Record, pages 1 to 3.) On May 12, 1910, the case was tried in the Union Circuit Court and was submitted to the court upon an agreed statement of facts, a jury being waived (R. pp. 4, 5.) The agreed statement of facts is as follows:

"The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Missouri, in which City and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other Counties of Arkansas and other States of the United States.

The manner and form in which said Company is conducting its business in Union and other Counties of Arkansas is as follows:

R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a Division Superintendent, has general supervision of said Company's business in Union and other Counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said Company known in its business as sample men or salesmen, and two other employees of said Company, known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said Company, and none of said employees has any financial or monetary interest in the property of said Company located in Union County, or in the sales or proceeds of sales made by them in said County or elsewhere in the State of Arkansas, other than the compensation hereinbefore referred to.

Each of said employees of said Company known as salesmen is furnished by said Company with a sample range, sample wagon and team, and is sent into such territory in Union or other Counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one-half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said Company fails to deliver the range so ordered within sixty days from date.

All orders so taken by said salesmen are forwarded by them to said Sutton, who investigates the credit of said purchasers and if same is found satisfactory he proceeds to have said orders filled within sixty days limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said Company hereinbefore referred to as delivery men, each one of whom is furnished with a delivery wagon and team by said Company for such purpose. All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to are the sole and ex-

clusive property of said Company. Under no circumstances do the employees hereinbefore referred to as salesmen sell, or offer to sell or deliver the sample ranges intrusted to them by said Company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said delivery men sell or offer to sell or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen.

All ranges so owned and manufactured are shipped in car load lots to Union County and other Counties, each car containing sixty separate and distinct ranges, each car being consigned by said Company to itself, in care of R. L. Sutton, its employee.

A car load of ranges was shipped from St. Louis, Missouri, to El Dorado, Arkansas, for the purpose of filling orders previously secured by said soliciting or traveling salesmen. Upon the arrival of said car at El Dorado, the ranges were taken from said car, loaded on said delivery wagon, and delivered by said delivery men to said purchasers in the precise shape, condition, form or packages in which they were delivered by said Company to the common carrier at St. Louis, Missouri.

At the end of each month said R. L. Sutton settles with each of said Company's employees hereinbefore referred to as salesmen and delivery men, and sends their reports and his own report to said Company, together with all notes taken by said salesmen for the sale of ranges during the month, and all cash in the hands of said Sutton in excess of $500 expense money, which he is allowed to retain in order to pay the expenses of conducting said Company's business during the following month.

It is further agreed by and between the State of Arkansas through its prosecuting attorney and the defendants herein that E. L. Gannaway and W. W. Denis are salesmen of the said Wrought Iron Range Company and have in Union County, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for ranges, and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

That A. C. Crenshaw and P. L. Hagler are acting as delivery men in the employ of said Wroght Iron Range Company and have in the manner hereinbefore set forth delivered ranges to parties in

Union County, Arkansas, who had previously given orders to the said above named salesmen, within twelve months before this time.

That all of said persons above named are hired employees of the said Wrought Iron Range Company and have been arrested, and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas.

A copy of the notes taken by the traveling salesmen above named is hereto attached and made a part of this agreed statement of facts." (R. pp. 10 to 12.)

There was no other evidence in the case.

Plaintiff in error then asked the Circuit Court to declare the law as follows:

"I. That Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their agent, is in violation of Section 8, Article 1 of the Constitution of the United States, and in so far as it does apply is void.

II. That the said Act No. 97 denies to citizens of other States all privileges and immunities granted to citizens of Arkansas, and is void because violative of Section 2, Article 4, of the Constitution of the United States.

III. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the Fourteenth Amendment to the Constitution of the United States and of Section 18, Article 2, of the Constitution of Arkansas.

IV. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each County in the State in the sale of the articles enumerated in the Act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

V. That the tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not uniform, and void as being in violation of Section 5, Article 16, of the Constitution of Arkansas.

VI. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense." (R. pp. 5 and 8.)

The court refused each of the above declarations, exceptions being properly saved to each ruling. (R. p. 8.)

The court thereupon found plaintiff in error guilty, and imposed a fine of Two Hundred Dollars ($200). (R. p. 5.)

From this judgment, plaintiff in error appealed to the Supreme Court of Arkansas, raising in that court the same question covered by the foregoing declarations of law, and on July 11, 1910, a judgment was entered affirming the judgment of the Union Circuit Court. (R. p. 15).

Specification of Errors.

"The Supreme Court of Arkansas erred in holding and deciding that Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, is valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

First. That said Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the appellant, and in which he was engaged, and for which he was convicted, is not in violation of Section 8, Article 1, of the Constitution of the United States, and that said act is not void in so far as it applies to said business.

Second. That said Act No. 97 does not deny to citizens of other States, and to this appellant as such, all the privileges and immunities granted to citizens of Arkansas, and that it is not void because violative of Section 2, Article IV, of the Constitution of the United States.

Third. That said Act No. 97 does not deny to persons within its jurisdiction the equal protection of the laws, and that it is not void because violative of the Fourteenth Amendment to the Constitution of the United States."

Points and Authorities.

I.

THE ACT OF ARKANSAS OF 1909 IN SO FAR AS IT APPLIES TO THE BUSINESS ENGAGED IN BY PLAINTIFF IN ERROR IS AN UNAUTHORIZED REGULATION OF INTERSTATE COMMERCE, AND AS SUCH IS IN CONFLICT WITH ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

Brown v. Maryland, 12 Wheat., 419.

Robbins v. Shelby Co. Taxing Dist., 120 U. S., 489.

Leloup v. Port of Mobile, 127 U. S., 640.

Asher v. Texas, 128 U. S., 129.

Leisy v. Hardin, 135 U. S., 100.

Brennan v. Titusville, 153 U. S., 289.

Stockard v. Morgan, 183 U. S., 27.

Caldwell v. North Carolina, 187 U. S., 632.

Rearick v. Pennsylvania, 203 U. S., 507.

Dozier v. Alabama, 218 U. S., 124.

II.

DISCUSSION OF THE OPINION OF THE SUPREME COURT OF ARKANSAS.

(A) IT IS IMMATERIAL WHETHER THE ACT OF ARKANSAS OF 1909 BE INTENDED AS A REGULATION OF PEDDLING AND NOT AS A REGULATION OR LICENSE UPON SOLICITING ORDERS; OR WHETHER IT BE REGARDED AS A POLICE OR A REVENUE MEASURE.

Brown v. Maryland, 12 Wheat., 419, 444.

Robbins v. Shelby Co. Taxing Dist., 120 U. S., 489.

Leloup v. Port of Mobile, 127 U. S., 640.

Brennan v. Titusville, 153 U. S., 289.

W. U. Telegraph Co. v. State, 82 Ark., 314, 315.

Welton v. Missouri, 91 U. S., 275.

Crutcher v. Kentucky, 141 U. S., 47.

(B) IT IS IMMATERIAL WHETHER THE CONTRACT OF SALE OF THE GOODS ORDERED BE EXECUTED IN THE STATE WHERE THE PURCHASER RESIDES, OR IN THE STATE FROM WHICH THE GOODS ARE SHIPPED; AND IT IS IMMATERIAL WHERE TITLE TO THE GOODS PASSES.

Rearick v. Pennsylvania, 203 U. S., 507.

Dozier v. Alabama, 218 U. S., 124.

Caldwell v. N. C., 187 U. S., 632.

Brennan v. Titusville, 153 U. S., 289.

Explanatory Statement.

The case at bar was in the State court tried together with the case of E. L. Gannaway v. State of Arkansas now in this court on writ of error, being No. 128, October term, 1912. In both cases, plaintiff in error in this court was at the time of arrest an employee of the Wrought Iron Range Company, a manufacturing concern located in St. Louis, Missouri, which does business by sending its salesmen into the different States and soliciting orders for the sale of stoves and ranges, the orders being subsequently filled by the shipment of the ranges from St. Louis into the State of the order, and delivery by the Company's agent to the purchaser there.

In the case of E. L. Gannaway, plaintiff in error, v. State of Arkansas, defendant in error, No. 128, the plaintiff in error was at the time of his arrest, which was on the same day as the arrest of the plaintiff in error in the case at bar, a salesman or solicitor of orders, operating in Union County, Ark. Crenshaw, plaintiff in error in this case, was at that time, as is shown by the agreed statement of facts, a delivery man for the same Company, it being his duty after orders had been obtained in any given locality by one of the salesmen, to report at the place of consignment of the ranges, to unload the same from the car and deliver them to the respective purchasers. In other words, plaintiff in error in this case was in the same position as the defendant, Caldwell, in the case of Caldwell v. North Carolina, 187 U. S., 632, Caldwell being a delivery man in the employ of the Chicago Portrait Company, and having at the time of his arrest, come to Greensboro, N. C., for the purpose of delivering pictures and picture frames for which orders had previously been solicited by other agents of the Company, who had preceded Caldwell in Greensboro. The effect of the

holding in that case is to put the party delivering goods shipped from another State, upon orders previously obtained, in the same position as the party who originally solicited the orders. That being true, the decision of the case at bar depends upon precisely the same points and authorities as the decision in the case of E. L. Gannaway, plaintiff in error, v. State of Arkansas, No. 128.

We therefore deem it unnecessary to more than call attention to the same points and authorities therein raised, and respectfully ask leave to adopt the brief in the Gannaway case as the brief in this case.

JOHN M. MOORE,

For Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

A. C. CRENSHAW.....*Plaintiff in Error,*

v. No. 127.

THE STATE OF ARKANSAS.....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The General Assembly of Arkansas, on April 1, 1909, passed an act entitled: "An Act to regulate the sale of lightning rods, steel stove ranges, clocks, pumps, buggies, carriages and vehicles in the several counties of this State." This act is in words and figures as follows, towit:

"Section 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license as hereinafter provided from the county clerk of such county, authorizing such person to conduct such business.

Sec. 2. That before any person shall travel over or through any county and peddle or sell any of the articles mentioned above, he

shall pay into the county treasury of such county the sum of two hundred dollars ($200), taking the receipt of the treasurer therefor, which receipt shall state for what purpose the money was paid. The county clerk of such county upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such county and sell such articles or article for a period of one year from the 1st day of January preceding the date of such license.

"Sec. 3. Any person who shall travel over or through any county in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two hundred dollars ($200) nor more than five hundred dollars ($500).

"Sec. 4. That any person who shall travel over or through any county in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this act.

"Sec. 5. All laws and parts of laws in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage."

The plaintiff in error was convicted before a justice of the peace of Union county, Arkansas, for a violation of this statute. The information filed against him charged him with the offense of peddling or selling steel stove ranges without the license required by the foregoing statute. Upon appeal to the Union Circuit Court the case was submitted to the court, sitting as a jury, upon the following agreed statement of facts (R. 10-12):

"The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Mo., in which city and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other counties of Arkansas and other States of the United States.

"The manner and form in which said company is conducting its business in Union and other counties of Arkansas is as follows:

"R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a division superintendent, has general supervision of said company's business in Union and other counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said company known in its business as sample men or salesmen, and two other employees of said company, known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said company, and none of said employees has any financial or monetary interest in the property of said company located in Union county, or in the sales or proceeds of sales made by them in said county or elsewhere in the State of Arkansas, other than the compensation hereinbefore referred to.

"Each of said employees of said company known as salesmen is furnished by said company with a sample range, sample wagon and team, and is sent into such territory in Union or other counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one-half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express

stipulation that same shall be void as against the purchaser in the event said company fails to deliver the range so ordered within sixty days from date.

"All orders so taken by said salesmen are forwarded by them to said Sutton, who investigates the credit of said purchasers and if same is found satisfactory he proceeds to have said orders filled within sixty days' limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said company hereinbefore referred to as delivery men, each one of whom is furnished with a delivery wagon and team by said company for such purpose. All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to are the sole and exclusive property of said company. Under no circumstances do the employees hereinbefore referred to as salesmen sell, or offer to sell or deliver the sample ranges intrusted to them by said company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said delivery men sell or offer to sell or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen.

"All ranges so owned and manufactured are shipped in car load lots to Union county and other counties, each car containing sixty separate and distinct ranges, each car being consigned by said company to itself, in care of R. L. Sutton, its employee.

"A car load of ranges was shipped from St. Louis, Mo., to El Dorado, Ark., for the purpose of filling orders previously secured

by said soliciting or traveling salesmen. Upon the arrival of said car at El Dorado, the ranges were taken from said car, loaded on said delivery wagon, and delivery by said delivery men to said purchasers in the precise shape, condition, form or packages in which they were delivered by said company to the common carrier at St. Louis, Mo.

"At the end of each month said R. L. Sutton settles with each of said company's employees hereinbefore referred to as salesmen and delivery men, and sends their reports and his own report to said company, together with all notes taken by said salesmen for the sale of ranges during the month, and all cash in the hands of said Sutton in excess of $500 expense money, which he is allowed to retain in order to pay the expenses of conducting said company's business during the following month.

"It is further agreed by and between the State of Arkansas through its prosecuting attorney and the defendants herein that E. L. Gannaway and W. W. Denis are salesmen of the said Wrought Iron Range Company and have in Union county, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for ranges, and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

"That A. C. Crenshaw and P. L. Hagler are acting as delivery men in the employ of said Wrought Iron Range Company and have in the manner hereinbefore set forth delivered ranges to parties in Union county, Arkansas, who had previously given orders to the said above named salesmen, within twelve months before this time.

"That all of said persons above named are hired employees of the said Wrought Iron Range Company and have been arrested, and

that neither of said parties nor the Wrought Iron Range Company have paid any license in Union county, Arkansas.

"A copy of the notes taken by the traveling salesmen above named is hereto attached and made a part of this agreed statement of facts."

Plaintiff in error asked the circuit court to declare the law as follows:

"1. That Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their agent, is in violation of section 8, article 1, of the Constitution of the United States, and in so far as it does apply is void.

"2. That the said Act No. 97 denies to citizens of other States all privileges and immunities granted to citizens of Arkansas, and is void because violative of section 2, article 4, of the Constitution of the United States.

"3. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the Fourteenth Amendment to the Constitution of the United States and of section 18, article 2, of the Constitution of Arkansas.

"4. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each county in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

"5. That the tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not

uniform, and void as being in violation of section 5, article 16, of the Constitution of Arkansas.

"6. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense" (R. pp. 5 and 8).

The court refused each of the above declarations, exceptions being properly saved to each ruling (R. p. 8).

The court thereupon found plaintiff in error guilty, and imposed a fine of two hundred dollars ($200) (R. p. 5).

Upon appeal to the Supreme Court of Arkansas the judgment of the circuit court was affirmed (R. p. 15).

The following specifications of error were filed by plaintiff in error:

"The Supreme Court of Arkansas erred in holding and deciding that Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, is valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

"The said errors are more particularly set forth as follows:

"The Supreme Court of Arkansas erred in holding and deciding:

"First. That said Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the appellant, and in which he was engaged, and for which he was con-

victed, is not in violation of section 8, article 1, of the Constitution of the United States, and that said act is not void in so far as it applies to said business.

"Second. That said Act. No. 97 does not deny to citizens of other States, and to this appellant as such, all the privileges and immunities granted to citizens of Arkansas, and that it is not void because violative of section 2, article 4, of the Constitution of the United States.

"Third. That said Act No. 97 does not deny to persons within its jurisdiction the equal protection of the laws, and that it is not void because violative of the Fourteenth Amendment to the Constitution of the United States."

By this writ of error there is drawn in question the validity of the act of the Arkansas Legislature set forth above in so far as it applies to the course of dealing pursued by plaintiff in error.

POINTS AND AUTHORITIES.

I.

THE SUPREME COURT OF ARKANSAS HAS CONSTRUED THE ACT OF 1909 AS AN EXERCISE OF THE POLICE POWER INHERENT IN THE STATE—THAT CONSTRUCTION IS CONCLUSIVE UPON THIS COURT.

The opinion below:

Barnhill v. State, 144 S. W. (Ark.) 211.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17.

Cargill Co. v. Minn., 180 U. S. 452.

Delamater v. S. D., 205 U. S. 93.

Atlantic Coast Line Ry. Co. v. Mazursky, 216 U. S. 122.

Hammond Packing Co. v. State of Ark., 212 U. S. 322.

Armour Packing Co. v. Lacey, 200 U. S. 226.

Kehrer v. Stewart, 197 U. S. 60.

Pullman Co. v. Adams, 189 U. S. 426.

Osborne v. Florida, 164 U. S. 650.

II.

THE PEDDLING ACT OF 1909 AS APPLIED TO THE FACTS IN THIS CASE IS IN NO JUST SENSE A REGULATION OF INTERSTATE COMMERCE, BUT IS A RIGHTFUL AND PROPER EXERCISE OF THE POLICE POWER INHERENT IN THE STATE AND IS NEITHER ARBITRARY, UNREASONABLE NOR CONTRARY TO ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

Sherlock v. Alling, 93 U. S. 99.

Cruther v. Kentucky, 141 U. S. 47.

Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96.

Chicago, Milwaukee, etc., Ry. Co. v. Solan, 169 U. S. 133.

Hennington v. Georgia, 163 U. S. 299.

L. S. & M. S. Ry. Co. v. Ohio, 133 U. S. 286.

Western Union Tel. Co. v. Kansas, 216 U. S. 27.

Asbell v. Kansas, 209 U. S. 251.

M., K. & T. Ry. Co. v. Haber, 169 U. S. 613.

G., C. & S. F. Ry. Co. v. Hefley, 158 U. S. 98.

C., R. I. & P. Ry. Co. v. Arkansas, 219 U. S. 126.

Emert v. Mo., 156 U. S. 296.

Allen v. Riley, 203 U. S. 347.

Woods v. Karl, 203 U. S. 358.

Ozan Lbr. Co. v. Union Co. Bank, 207 U. S. 251.

III.

THE INSTANT CASE MAY BE CLEARLY DISTINGUISHED FROM THE CASES CITED AND RELIED UPON BY PLAINTIFF IN ERROR.

ARGUMENT.

I.

THE SUPREME COURT OF ARKANSAS HAS CONSTRUED THE ACT OF 1909 AS AN EXERCISE OF THE POLICE POWER INHERENT IN THE STATE. THAT CONSTRUCTION IS CONCLUSIVE UPON THIS COURT.

The "Peddling Act" of 1909, the validity of which is drawn in question, has been construed by the Supreme Court of Arkansas as an exercise of the police power. (See opinion below.)

In *Barnhill* v. *State, supra,* the Supreme Court of Arkansas had occasion again to construe the act in question. We quote the following from the opinion in that case:

"The gist of the offense created by this statute does not consist of making sales without license but in peddling without license. As is held in the case of *Crenshaw* v. *State, supra,* in order to constitute peddling there must be the element of traveling from place to place, over and through the county, for the purpose of making sales. The statute does not declare it an offense to make sales, nor does it seek to impose a license fee or tax on sales, but only makes it an offense for one to go about from place to place, from residence to residence, in and through the county in the prosecution of a wayfaring business, without procuring license, whether in making sales or in taking orders. As was said relative to a statute quite similar to this by the Supreme Court of the United States, 'Its object in requiring peddlers to take out and pay for licenses and to exhibit their licenses on demand to any peace officer or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds and even thefts which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door.' *Emert* v. *Missouri,* 156 U. S. 296. This statute is directed at an itinerant occupation which may endanger the peace and safety of the citizens of the State, and not at a business which only involves the sale of property. It is but the exercise of the police power of the State, and, as was said in the above case of *Emert* v. *Missouri, supra,* 'it is

nowise repugnant to the power of Congress to regulate commerce among the several States but is a valid exercise of the power of the State over persons in business within its borders.' "

The Supreme Court of Arkansas upheld the validity of this statute as a police regulation. That construction, thus placed upon the act by the highest court of Arkansas, is binding here.

In *Pabst Brewing Co.* v. *Crenshaw, supra,* this court refused to review the determination of the State court that the statute involved in that case was not a revenue but an inspection measure.

In *Delamater* v. *South Dakota, supra,* this court, speaking through its present Chief Justice, said:

"The contention that the law of South Dakota was a taxing law and not a police regulation, and therefore within the purview of the Wilson act, is in conflict with the purpose of that law as interpreted by the Supreme Court of South Dakota."

Other cases sustaining the rule here invoked that the construction placed upon the act of a State Legislature by the highest court of the State, both as to the purpose and terms of the statute, is conclusive upon this court, have been cited *supra.* We deem it unnecessary to further discuss the question.

II.

THE PEDDLING ACT OF 1909 AS APPLIED TO THE FACTS IN THIS CASE IS IN NO JUST SENSE A REGULATION OF INTERSTATE COMMERCE, BUT IS A RIGHTFUL AND PROPER EXERCISE OF THE POLICE POWER INHERENT IN THE STATE AND IS NEITHER ARBITRARY, UNREASONABLE NOR CONTRARY TO ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

In view of the many previous decisions of this court it can not be doubted that the State may adopt many regulations of a purely local character which, though they indirectly affect interstate commerce and the instrumentalities engaged in such commerce, yet they are not, within the meaning of the Constitution, a regulation of, or burden upon interstate commerce.

In *Sherlock* v. *Alling, supra,* Mr. Justice Field, in delivering the opinion of the court, said (page 103):

> "In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In that case a statute of Indiana, giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, and providing "for the better security of the lives of passengers on board of vessels," was said to be constitutional and no encroachment upon interstate commerce as fixing the liability for injuries caused by colliding boats, both of which were engaged in interstate commerce.

In *Crutcher* v. *Ky., supra,* we find this language used by Mr. Justice Bradley, who delivered the opinion in that case (page 61):

"It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, *with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce.* Such regulations are eminently local in their character, and in the absence of congressional regulations over *the same subject,* are free from all constitutional objections, and unquestionably valid." (Italics are ours.)

In *Nashville, etc., R. R.* v. *Alabama, supra,* the same learned judge, in delivering the opinion of this court, said (page 99):

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees and others on railroad trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had it is clearly within the competency of the States to provide against accidents whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, *there is danger to life or property,* it is not only within the power of the State, but is among their *plain duties,* to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far as it is practicable. (Italics are ours.)

"Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect interstate commerce. Citing *Mobile County* v. *Kimball,* 120 U. S. 691."

This court, in *Chicago, Milwaukee, etc., R. R. Co.* v. *Solan, supra,* discussing the power of the State to pass laws, which may indirectly and incidentally affect interstate commerce, says:

"It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to

prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, within themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce."

In *Hennington* v. *Georgia, supra,* it was held that a statute of Georgia forbidding the running of freight trains on any railroad within the State on Sunday, although it affects interstate commerce, in a limited degree, was not for that reason a needless intrusion upon the domain of Federal jurisdiction. That it is not invalid as being repugnant to the Constitution of the United States, and must be respected in the courts of the Union until superseded and displaced by some act of Congress, passed in execution of the power granted it under the Constitution.

The defendant in that case was the superintendent of transportation of a railroad which was engaged in interstate commerce, operating in the States of Alabama, Mississippi, Tennessee and Georgia.

After reviewing the authorities on the question, Mr. Justice Harlan, who delivered the opinion of the court, sustained the State legislation in the following language (pages 317, 318):

"These authorities make it clear that the legislative enactment of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected by the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the pow-

ers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic, as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their calling, the transportation of freight shall be suspended.

"We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States."

The same learned judge, in the opinion rendered in *L. S. & M. S. Ry. Co.* v. *Ohio, supra,* says:

"This power of the States (referring to the power to regulate the rights and duties of all persons within its jurisdiction, to provide for the public convenience and public good) is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which National legislation can be constitutionally extended. When Congress acts with reference to a matter conferred to it by the Constitution, then its statutes displace all *conflicting local regulations* touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general Government." (Matter in parenthesis and italics is ours.)

In *Western Union Telegraph Co.* v. *Kansas, supra,* we find a very recent expression of this court upon the power of a State to pass such laws as the one whose constitutionality is now in question.

Justice Harlan, who wrote the opinion of the court in that case, uses this language:

"This has been done without violating the principle that a common carrier entering a State for purposes of its business, is subject to local regulations, that, in their essence and purpose, only incidentally affect interstate commerce, but are established in good faith for the protection, safety and comfort of the people, are not in themselves in any real, just sense an obstruction to, or in conflict with, the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and are to be respected until Congress covers the subject by legislation. (Citing cases)."

In the case of *Asbell* v. *Kansas, supra,* this court, after affirming the right of the State of Kansas to pass inspection laws, the object of which was to exclude from said State cattle infected with contagious, infectious or communicable disease, even though "it may have had an incidental and indirect effect upon commerce between the States," said:

"The cause, however, can not be disposed of without inquiring whether there was, at the time of the offense, any legislation of Congress *conflicting* with the State law. If *such* legislation was in existence, the State law, so far as it affected interstate commerce, would be compelled to yield to its supreme authority." (Italics are ours.)

In the case of *M., K. & T. Ry. Co.* v. *Haber, supra,* which was also a cattle inspection case, the court said:

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be settled with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded *as inconsistent* with an act of Congress passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive that the two acts can not be reconciled or stand together.*" (Italics are ours.)

And in the same case the court further said:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a State belong primarily to such State under its reserved powers to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by National legislation, any action taken by the State upon that subject that does not *directly interfere* with rights secured by the Constitution of the United States, or by some valid act of Congress, must be respected *until Congress intervenes.*" (Italics are ours.)

In *G., C. & S. F. Ry. Co.* v. *Hefley, supra,* the same thought was thus expressed:

"Generally, it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislate upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the Nation."

In *C., R. I. & P. Ry. Co.* v. *Arkansas, supra,* this court had under consideration an act of of the Legislature of Arkansas requiring all railroads operating a line more than fifty miles in length, to maintain a crew of a certain number of men for the operation of all freight trains of twenty-five cars or more. This court held that, as applied to an interstate train, this regulation of the State of Arkansas did not amount to an unconstitutional burden upon commerce between the States. Mr. Justice Harlan, who delivered the opinion of the court, said:

"The statute here involved is not in any proper sense a regulation of interstate commerce."

We believe the case from which we have quoted amply sustain the validity of the present act. Congress, in the exercise of its

power to regulate commerce between the States, has not seen fit to provide regulations governing what we are pleased to term "interstate peddling."

There are many reasons for this failure of Congress to legislate on the subject-matter. What would be a reasonable regulation in one part of the country would not be in another. In crowded urban districts one sort of regulation might be desired, while in sparsely settled rural communities quite a different regulation might be deemed proper. With some classes of peddlers a closer and more strict regulation is desired than with others, the nature of the regulation depending not only upon the character of the articles peddled, but also upon the manner in which the peddling is done and the localities affected. It would be quite impossible for the Congress to adopt a general scheme of regulation which would be efficient in all parts of the country. This fact must have been recognized by the Congress, hence its failure to legislate upon the subject, thereby leaving free and untrammeled, the several State Legislatures. A State law regulating peddling, therefore, being, in its very nature, an exercise of the police power, where no provision of the fundamental law is violated and where there has been no unjust classification, discriminating in its effects, should be upheld as an act of State sovereignty and as peculiarly within the province of the State.

As seen from the opinion below, the judgment of the Supreme Court of Arkansas was largely placed upon the decision of this court in *Emert* v. *Missouri, supra.* In discussing that case, we can do no better than copy from the opinion of the Supreme Court of Arkansas:

"The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute.

This definition varies from the common law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words 'peddle' and 'sell' are used synonymously, but in order to come within the terms of the statute it is essential that the sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be added the element of traveling from place to place, over and through the county, for the purpose of selling, in order for the statute to reach it. It should also be especially noted that the statute does not discriminate against nonresidents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description.

"The opinion of the Supreme Court of the United States, delivered by Mr. Justice Gray in *Emert* v. *Missouri*, 156 U. S. 296, announces the law applicable to the case and sustains the views we express. In that case, the agent of a nonresident manufacturer of sewing machines was engaged in peddling machines in Missouri without obtaining a license as required by the statute of that State. He asserted his right to sell free of license, on the ground that the transaction constituted interstate commerce. All of the prior decisions are reviewed and the following conclusions announced:

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take and pay for license, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, and even thefts, which as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door. * * * The necessary conclusion upon authority, as well as upon principle is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders.

"It is true in that case the vendor carried the machines with him from place to place, and made deliveries as he sold them. But we can not see that that alters the principle, for the Legislature has

the power to define the act of peddling, and that definition should be upheld by the courts unless it is manifestly evasive."

In *Barnhill* v. *State, supra,* the Supreme Court of Arkansas, further discussing the validity of the act in question, referred to the decisions of this court sustaining State statutes requiring that notes, otherwise negotiable, the consideration for which is a patent right or a patented article, should be executed in the prescribed manner or otherwise be invalid. We quote from the opinion in the *Barnhill case* as follows:

"It has been held by the Supreme Court of the United States that State statutes requiring that notes otherwise negotiable instruments, the consideration for which is a patent right or patented article, should be executed in a prescribed manner or otherwise be invalid as negotiable paper or even void, are not in contravention of any provision of the Federal Constitution or of any power given to Congress to legislate relative to the subject-matter of such transactions. This ruling is based upon the ground that such State legislation is but the exercise of the police power of the State in the protection of its citizens against fraud and imposition which common experience has shown can be more readily perpetrated in cases where the sale of patent rights and patented articles is the subject-matter of the transaction. Allen v. Riley, 203 U. S. 347; Woods v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Co. Bank, 207 U. S. 251.

"In the latter case it is said: 'The various itinerant venders of patented articles, whose fluency of speech and carelessness regarding the truth of their representations might almost be said to have become proverbial, were of course in the mind of the Legislature and were included in this legislation. Indeed, they are the principal people to be affected by it.'

"In the latter case the transaction involved a contract of sale concerning a matter which was the subject of interstate commerce and while the question as to whether or not such State legislation relative to patent notes was affected by reason of the fact that the patented article sold was shipped in interstate commerce was not expressly passed on in the opinion rendered by the Federal Supreme Court, it does appear to have met the attention of the United States Circuit Court of Appeals in that case and is there noted. Union

Co. Bank v. Ozan Lumber Co., 179 Fed. 710. But in those cases this character of legislation is recognized as a valid police regulation enacted by the State for the peace and security of its citizens. The peddling statute of this State we think is that character of legislation and is for that reason valid."

We think the analogy is clear which the Supreme Court of Arkansas has drawn between the present case and the line of decisions sustaining the right of the State to regulate, the execution of notes given for patent rights or patented articles.

We desire to especially call the court's attention to the fact that the police regulation of the State of Arkansas affecting stove peddlers does not discriminate against products of foreign States or in favor of products of Arkansas, nor does it discriminate against residents of foreign States nor in favor of residents of Arkansas. It applies uniformly and alike upon all stove peddlers, whether they be citizens of Arkansas or citizens of other States, and whether they represent resident or nonresident principals.

It is believed that no provision of the Constitution of the United States has been assailed by the Legislature of Arkansas, and it is not contended by counsel in their brief in this case that the act in question contravenes the Fourteenth Amendment. The entire argument is directed at the proposition we have been discussing and it is insisted that the statute is void because repugnant to the commerce clause of the Constitution. We believe that such is not the case. In so far as the statute affects commerce at all it is remote and indirect, and in view of the previous decisions of this court, it can not be said that the "peddling act" of Arkansas is in any just sense a regulation of, or a burden upon commerce between the States.

III.

THE INSTANT CASE MAY BE CLEARLY DISTINGUISHED FROM THE CASES CITED AND RELIED UPON BY PLAINTIFF IN ERROR.

From the authorities cited and discussed in the preceding subdivision of this brief, it is clear that the State has the right, in exercising here police power, to pass many statutes which indirectly and remotely affect interstate commerce, but which have been upheld in many instances by this court as being in no just sense a regulation of or burden upon commerce between the States.

The act which is now before the court being, as we have seen, a reasonable exercise of the police power and not discriminating between the products or manufactured articles of the several States, must be upheld unless its operation as applied to the facts in this case make it a burden upon interstate commerce.

This case is to be distinguished from a number of cases heretofore decided by this court and cited and relied upon by plaintiff in error in this: The statutes condemned in the previous adjudications of this court, it is believed, have practically all been statutes passed by States in the exercise of their taxing power. These statutes have been condemned by this court because they either amounted to a tax upon property which was a subject of interstate commerce, or a tax upon the sale, or offer to sell of articles situated in another State from that where the tax was demanded and which were afterwards to be transported to the taxing State, thereby becoming a part and parcel of interstate commerce.

An examination of the cases, it is believed, will show that in nearly every instance the statute condemned as construed by the

State courts operated as a tax either upon the property itself or upon the sale or offer to sell the same. In each instance the taxing power of the State had been sought to be exercised either upon articles that formed a part of interstate commerce or upon the sale or offer to sell of articles which were intended to become a part of interstate commerce. Thus the State placed a tax upon interstate commerce and by statute attempted to regulate and burden such commerce.

In the instant case the statute is not a taxing statute, but a police regulation merely, intended to protect the citizens from cheats and frauds, and the State's authority to pass such a statute has been many times recognized by this court. As we have attempted to show before, there was no attempt to regulate interstate commerce or to *levy a tax* of any kind. It is true a license fee is demanded, but not for the purpose of raising revenue, but as a police regulation. The situation which the Legislature of Arkansas attempted to regulate and to police was an internal situation—the regulation of a pursuit and occupation which has since the days of the Common Law been regarded as one peculiarly within the province of the State to regulate.

Speaking of the sort of peddling to which the Arkansas statute refers, the Pennsylvania court, in *Titusville* v. *Brennan,* said:

"He comes into this State, according to the case stated, in order that he may here engage in the business of going from house to house to sell frames and pictures for a dealer who resides in another State. He hunts his customers at their own homes. To the inmates of the homes in which he intrudes himself he exhibits what he alleges to be a sample of the goods he is to supply. The only apparent difference between him and the ordinary pack peddler is that the peddler produces the precise article he offers for sale, and delivers it to the purchaser on the spot; while the defendant produces from his pack a sample. The customer relies on his assurance that it will be like it, and the article is subsequently delivered by some itinerant, or by express, if it is ever delivered at all. There

is in each case the same intrusive domiciliary visitation; the same relentless personal pursuit of a purchaser; the same practical and insistent itinerant salesman adroitly pressing his wares on the attention of those who neither need nor wish them, but who are unable to resist the wiles or penetrate the deceptions practiced upon them. The business of both is, in general character, the same."

This case afterwards came to this court, when the judgment of the lower court was reversed (153 U. S. 289), this court holding that the statute as applied to the facts in that case amounted to a regulation of, and burden upon interstate commerce. The statute under consideration in that case was very different from the act of Arkansas. It was a revenue measure and was so recognized by this court.

The decision in *Brennan* v. *Titusville, supra,* seems to have been based upon the ground that the State had exceeded her power of taxation and that the tax in question could not be collected because it amounted to tax upon interstate commerce. Mr. Justice Brewer, speaking for the court as to the nature of the act, said:

"This license does not purport to be exacted in the exercise of the police but rather of the taxing power."

And further in the case:

"The license, therefore, the failure to take out which is the offense complained of and for which the defendant was sentenced, is a license for 'general revenue purposes' within the very declaration of the ordinance."

While it is true that there are limits even in the exercise of the police power and a point beyond which the State may not go without coming into conflict with the Federal Constitution, yet it is thoroughly established that an act passed in pursuance of the police power will not be declared void because it indirectly affects interstate

commerce. This court in *Brennan* v. *Titusville* recognized the authority of the State in the exercise of its police powers and said:

"It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State."

The ordinance condemned in that case provided for the payment of a license by *"all persons,"* canvassing or soliciting within said city orders for goods, books, pictures, etc., or persons delivering such articles under orders so obtained or solicited."

It is thus seen that the ordinance differs from the law of Arkansas in two particulars; first, it is a revenue measure, and, second, it does not apply *only* to peddlers, a class of persons coming peculiarly under the purview of the police power, but, upon the other hand, it applies to *any and all persons* who canvass or solicit, or deliver articles upon orders previously obtained.

The case of *Robbins* v. *Shelby Co. Taxing Dist.*, 120 U. S. 489, may be easily distinguished from the case at bar. The statute, the validity of which was drawn in question in that case, was an act relating to the subject of taxes. It was therefore an exercise of the taxing power and not the police power, and in that important particular it is different from the Arkansas act. The statute there under consideration provided that "all drummers and all persons not having a regular licensed house of business in the taxing district, *offering for sale or selling goods, wares, etc.*, by sample shall be required to pay" a certain sum for such privilege. That statute did not apply to *peddlers only*, who have long been recognized as a separate class, and as such class subject to the control of the State in the exercise of its police power.

The Tennessee statute was a tax imposed upon the privilege of selling or offering for sale, regardless of the manner of such sale, or the fact that the goods sold or offered to be sold, were in another State and that the transaction was an interstate transaction. It provided a tax upon the sale, and as such it was void as applied to interstate transactions. In that case Chief Justice Waite, in a learned dissenting opinion, said:

"I can hardly believe it would be contended that the provisions of the same statute now in question which fixes a license fee for all peddlers in the district would be held to be unconstitutional in its application to peddlers who came with their goods from another State and expected to go back again."

As said by the Supreme Court of Arkansas in the opinion below:

"*Robbins* v. *Shelby County Taxing District,* 120 U. S. 489, and the line of similar cases in that court, concerned statutes and ordinances imposing license fees on drummers who solicited orders for nonresident merchants, and such legislation was declared to be a burden on interstate commerce. Here no such burden is imposed for the license is not demanded merely for soliciting orders but for peddling."

And at another place in the opinion below, the Supreme Court of Arkansas, in discussing the evils sought to be remedied by this statute, said:

"The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute. This definition differs from the common law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words 'peddle' and 'sell' are used synonymously, but in order to come within the terms of the statute it is essential that a sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be the element of traveling

from place to place, over and through the county, for the purpose of selling, in order for the statute to reach to it. It should also be especially noted that the statute does not discriminate against non-residents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description."

In *Dozier* v. *Ala.*, 218 U. S. 124, the act condemned provided for the payment of a tax by all persons who solicit orders for the enlargement of photographs or pictures of any character, or for picture frames, except those having a permanent place of business in the State. *This was not a peddling act.* It attempted to regulate directly all sales and offers to sell, and hence, as applied to interstate transactions, it was void.

Leisy v. *Hardin,* 135 U. S. 100, arose under a statute prohibiting the sale of intoxicating liquor without license. The decision was rendered before the passage of the Wilson act and this court held that, as applied to imported goods sold in original packages, it was a burden on interstate commerce. In that case it was made a violation of law to sell without a license. It is not so with the Arkansas statute. It is no violation of the law to sell stoves and ranges without the payment of a license. *It is,* however, a violation of the Arkansas statute to engage in the occupation of peddling stoves and ranges without the payment of a license. In that respect the instant case may be distinguished from *Leisy* v. *Hardin, supra.*

The case of *Asher* v. *Texas,* 128 U. S. 129, merely follows the case of *Robbins* v. *Shelby County Taxing District, supra,* it being said by the court that there was no difference between the two cases. The act before the court in the *Asher case* being in all respects similar to the Tennessee act condemned in the *Robbins case.* Neither were acts regulating the business of peddling, but were revenue

acts providing for the payment of a special tax for the privilege of selling and offering to sell by sample.

In the case of *Welton* v. *Missouri,* 91 U. S. 275, the statute was condemned by this court because it discriminated between the products of Missouri and the products of other States. Thus it amounted to a burden upon interstate commerce in that it required the payment of a tax by those who imported the products of other States and sold the same in Missouri, and did not require such tax upon those who sold domestic products.

The case of *Crutcher* v. *Kentucky,* 141 U. S. 47, has no direct application to the question now before the court. In that case it was held (quoting from the syllabus):

"The act of the Legislature of Kentucky of March 2, 1860, 'to regulate agencies of foreign express companies,' which provides that the agent of an express company not incorporated by the laws of that State shall not carry on business there without first obtaining a license from the State, and that, preliminary thereto, he shall satisfy the Auditor of the State that the company he represents is possessed of an actual capital of at least $150,000, and that if he engages in such business without license he shall be subject to fine, is a regulation of interstate commerce so far as applied to a corporation of another State engaged in that business, and is, to that extent, repugnant to the Constitution of the United States."

In *Stockard* v. *Morgan,* 185 U. S. 27, the statute under consideration was a revenue measure providing for the payment of a privilege tax and as applied to the facts in that case it was held void as coming within the rule laid down in the case of *Robbins* v. *Shelby County Taxing District.* This statute was not a police regulation and it did not apply to a separate class of persons such as peddlers.

In *Caldwell* v. *North Carolina,* 187 U. S. 622, a city ordinance provides tha *"every person* engaged in the business of selling or

delivering picture frames, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of $10 for each year."

This statute was also a revenue statute and as applied to the facts in that case was unconstitutional and void as a tax directly upon interstate commerce.

In *Rearick* v. *Pennsylvania,* 203 U. S. 507, the ordinance does not appear to have been a peddling ordinance. It provided for the payment of a tax by any one who solicited orders, who sold or delivered at retail either on the streets or by traveling from house to house, any goods not of the parties' own manufacture or production. This ordinance was not directed at the business of peddling. There was no attempt upon the part of the State to regulate that class of itinerant vendors, but it provided for a tax upon the sale or offer to sell of goods, wares or merchandise. As such it was held to be invalid when applied to one who solicited orders which were transmitted to a foreign State where the goods were applied to the orders and forwarded to an agent of the shipper who made the deliveries.

The case of *Leloup* v. *Port of Mobile,* 127 U. S. 640, like the case of *Crutcher* v. *Ky., supra,* arose under a stattue which directly affected and burdened interstate commerce. There is no close application between the principles therein decided and the principles here involved.

The case of *Brown* v. *Maryland,* 12 Wheaton, 419, involved the validity of a statute imposing the payment of a tax upon all im-

ports. The statute was a revenue measure and amounted to a tax directly upon interstate commerce. It was not an internal regulation and as such a competent exercise of the police power, but was an attempt by Maryland to tax articles and the sale of articles which were subjects of interstate commerce.

In conclusion, we respectfully submit that the act in question is not repugnant to the commerce clause of the Constitution of the United States, but that it is a valid and proper exercise of the police power which the State has never surrendered.

HAL. L. NORWOOD,
Attorney General.

WM. H. RECTOR,
Assistant Attorney General.

T. M. MEHAFFY,
CHAS. C. REID,
For Defendant in Error.

(22,304)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 128.

E. L. GANNAWAY, PLAINTIFF IN ERROR,

vs.

THE STATE OF ARKANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ARKANSAS.

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1 *Caption.*

In Union Circuit Court.

930.

STATE OF ARKANSAS, Plaintiff,
vs.
E. L. GANAWAY, Defendant.

Transcript.

Pleas Before J. P. Tatum, Justice of the Peace, El Dorado Township.

Pleas Before G. W. Hays, Circuit Judge of the 13th Judicial Circuit of Arkansas.

2 *Warrant of Arrest.*

The State of Arkansas to any Sheriff, Constable, Coroner, or Policeman, in this State:

It appearing that there are reasonable grounds for believing that E. L. Ganaway has committed the offense of peddling or selling steel stove ranges without license in the County of Union; you are therefore commanded forthwith to arrest him and bring him before me, to be dealt with according to law.

Given under my hand, as Justice of the Peace for Union County, this 27 day of Nov., 19—.

J. P. TATUM,
Justice of the Peace.

Summons as witness for the State:

—— ——.
—— ——.
—— ——.

—— ——,
Justice of the Peace.

(Endorsed on Back:) No. —. Justice's Court, El Dorado Township, Union County. State of Arkansas versus E. L. Ganaway et al.

STATE OF ARKANSAS,
County of Union, ss:

I have this 27 day of Nov. A. D. 1909, duly served the within by arresting the within named E. L. Ganaway and have him now in court as therein commanded.

Fees.

Services	$1.00
Mileage and Ferriage	.10
Attending Court and Guarding Prisoner	
Return and Bond	.60
Mileage on Witnesses	
Commitment	
Mileage on Commitment	
Summoning — Witnesses	
Total	$1.70

J. W. HARMAN, *Sheriff.*

Filed this 29 day of Nov., A. D. 1909. J. P. Tatum, Justice of the Peace.

Filed August 21, 1910. O. A. Miles, Clerk.

3 *Bail Bond.*

STATE OF ARKANSAS,
County of Union:

E. L. Ganaway being in custody, charged with the offense of Peddling or Selling Steel Stove Ranges and being permitted to give bail in the sum of Two Hundred Dollars, now we E. L. Dunaway, Principal, and G. E. Slade, sureties, hereby undertake that the above named E. L. Ganaway shall appear in the Union County Circuit Court, on the first day of its next 3 day Dec. Term, 1909, to answer said charge, and shall at all times render himself amenable to the order and process of said Court, in the prosecution of said charge, and if convicted shall render himself in execution thereof, or if he fails to perform either of these conditions, that we will pay the State of Arkansas the sum of Two Hundred Dollars.

E. L. GANAWAY. [L. S.]
G. E. SLADE. [L. S.]

G. E. Slade upon oath say- that he is a citizen of the State of Arkansas, and *are* worth the sum of Two Hundred Dollars in property situate in said State over and above his just debts, liabilities and exemptions and subject to execution.

G. E. SLADE. [L. S.]

Subscribed and sworn to before me this 29th day of *Bov.*, 191–.

J. W. HARMAN, *Sheriff.*

Filed Jan'y 21, 1910.

O. A. MILES, *Clerk.*

4 *Transcript of J. P. Tatum. J. P. Docket.*

STATE OF ARKANSAS, Plaintiff,
vs.
E. L. GANAWAY, Defendant.

Peddling Stoves Without License.

On the 26th day of November, 1909, Jno. Y. Stevens, Prosecuting Attorney files bill of information against the defendant. Thereupon warrant was issued and the defendant was arrested and placed under Bond for Two Hundred Dollars.

On December 2nd, 1909, pursuant to adjournment, the Court was in session with all the parties to this suit and by agreement this case was submitted to the Court upon a question of law, the facts in the cause having been agreed to by all parties.

The Court having heard the argument of the counsel, is of the opinion that defendant is guilty and as a punishment therefor imposes upon him a fine of two hundred dollars. Defendant files motion of appeal and files his affidavit and bond.

Given under my hand 12, 2, '09.

J. P. TATUM, *J. P.*

Fees.

J. P. Tatum, J. P. fees	$4.80
J. W. Harman, Sheriff	13.60
J. Y. Stevens	10.00
Witness	3.50
	$31.90

Endorsement: Filed January 21st, 1910. O. A. Miles, Clerk.

5 In Justice Court, El Dorado Township, Union County, Arkansas.

Before J. P. Tatum, Justice of Peace.

THE STATE OF ARKANSAS, Plaintiff,
vs.
E. L. GANAWAY, Defendant.

The defendant E. L. Ganaway, having appealed from a judgment rendered against him by J. P. Tatum, Justice of the Peace of El Dorado Township, Union County, Arkansas, on the 3rd day of December, 1909, for a fine of Two Hundred Dollars and costs upon a charge of peddling and selling Steel Ranges in Union County, Arkansas, without first having procured a license. We acknowledge ourselves to owe and be indebted to the State of Arkansas in the sum of Four Hundred and Ten ($410.00) conditioned that the

said defendant, E. L. Ganaway, shall appear in the Union Circuit Court at its next March Term, A. D. 1910, and submit himself to the jurisdiction thereof and not depart therefrom without leave of said Court.

Given under our hands this the 3rd day of December, 1909.

E. L. GANAWAY.
J. J. HUDSON.
W. M. BELLOTT.

STATE OF ARKANSAS,
County of Union:

W. M. Bellott and J. J. Hudson states on oath that they each have and own property in Union County, Arkansas, subject to exemption, over and above their debts and liabilities in the sum of four hundred and ten dollars, over and above their legal exemptions.

J. J. HUDSON.
W. M. BELLOTT.

Subscribed and sworn to before me this the 3rd day of December, A. D. 1909.

J. W. HARMAN, *Sheriff.*

Endorsement: Filed Jan'y 21st, 1910. O. A. Miles, Clerk.

6 *Record Entries.*

March Term, 1910, 1st Day.

STATE OF ARKANSAS,
County of Union:

MONDAY, *March 21st,* 1910.

At a regular term of the Circuit Court of Union County begun and held at the Court house in the Town of El Dorado on the 21st day of March, 1910, the same being the 3rd Monday in March and the time prescribed by law for holding said Court, present and presiding Hon. G. W. Hays, Judge 13th Judicial Circuit, which includes the said County of Union, Court was duly opened and the following proceedings were had to-wit:

It is ordered that Court adjourn until tomorrow morning at 8:30 o'clock.

G. W. HAYS,
Judge, 13th Judicial Circuit.

7 March Term, 1910, 6th Day.

MONDAY, *April 4th,* 1910.

Court met pursuant to adjournment present and presiding Hon. G. W. Hays, Judge of the 13th Judicial Circuit, Court was duly opened and the following proceedings were had to-wit:

930.

STATE OF ARKANSAS
vs.
E. L. GANAWAY.

Passed and Set for Thursday 2nd Week.

Comes State by J. Y. Stevens and comes also the defendants herein in person and by attorney and on motion and by consent the cause is passed and set for Thursday, Second Week of this Term.

It is ordered that Court adjourn until tomorrow at 8:30 o'clock.

G. W. HAYS,
Judge, 13th Judicial Circuit.

8 March Term, 1910, 16th Day.

THURSDAY, *May 12th*, 1910.

Court met pursuant to adjournment, present and presiding Hon. G. W. Hays, Judge of the 13th Judicial Circuit. Court was duly opened and the following proceedings were had to-wit:

930.

STATE OF ARKANSAS
vs.
E. L. GANAWAY.

Appeal-Cause Submitted to the Court by Consent upon Agreed Statement of Facts and Declarations of Law and Court Finds Defendant Guilty and Fixes His Punishment at a Fine of $200.00. Motion for New Trial Filed. Overruled. Defendant Excepts and Prays an Appeal to the Supreme Court. Granted and Defendant Allowed 20 Days to File His Bill of Exceptions Herein, and Defendant Permitted to Give $300.00 Bond.

Judgment.

Comes State of Arkansas by J. Y. Stevens, Prosecuting Attorney. Comes also E. L. Ganaway in person and by Attorney and on motion and by consent of both sides, a jury is hereby waived and this cause submitted to the Court sitting as a jury. The Court after hearing the testimony in the case, and being fully advised in the premises finds the defendant guilty as charged herein, and fixes his punishment at a fine of Two Hundred Dollars.

It is therefore considered, ordered and adjudged by the Court that the State of Arkansas have and recover of and from the defendant E. L. Ganaway the sum of Two Hundred Dollars fine together with all cost herein expended.

Whereupon defendant by his attorney files his motion for new

trial of this cause, which motion is taken up, argued and submitted to the Court and by the Court overruled, to which ruling of the Court defendant excepts and asks that his exceptions be noted of record which is accordingly done and prays an appeal to the Supreme Court of Arkansas, which appeal is by the Court granted and
9 it is ordered by the Court that the defendant be allowed twenty (20) days in which to file his bill of exceptions herein.

And it is further ordered by the Court that defendant be permitted to enter into Bond in the sum of ($300.00) Three Hundred Dollars pending said appeal.

10 *Findings of Facts.*

The Court finds the Facts as Follows:

"The Court finds that the defendant was engaged as Agent of the Wrought Iron Range Company in taking orders for articles of commerce moving between the States of Missouri and Arkansas, and that the character of ranges, as articles of commerce between the States, was not changes from the time the orders were taken to the time of delivery to the purchaser."

The Court declared the law as follows:

Refused.

1. That Act No. 97 of the Legislature of Arkansas, approved April 1st, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their Agent is in violation of Section 8, Art. 1, of the Constitution of the United States, and in so far as it does apply is void.

Refused.

11. That the said Act No. 97 denies to Citizens of other States all privileges and immunities granted to Citizens of Arkansas, and is void because violative of Sec. 2, Art. 4, of the Constitution of the United States.

Refused.

III. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the 14th Amendment to the Constitution of the United States, and of Section 18, Art. 2, of the Constitution of Arkansas.

Refused.

IV. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each County in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the
11 purpose of licensing and taxing for regulation is void on its face.

Refused.

V. That the Tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not uniform, and void as being in violation of Section 5, Art. XVI, of the Constitution of Arkansas.

Refused.

VI. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense.

Endorsement: Filed May 12th, 1910. O. A. Miles, Clerk.

12 In the Union Circuit Court, March Term, 1910.

STATE OF ARKANSAS, Plaintiff,
vs.
E. L. GANAWAY, Defendant.

Motion for New Trial.

Comes the defendant and moves the court to grant him a new trial herein and for cause states:

1st. The Court erred in not finding the facts as requested by defendants as follows:

"The Court finds that the defendant was engaged as Agent of the Wrought Iron Range Company in taking orders for Articles of Commerce moving between the States of Missouri and Arkansas and that the character of the ranges, as articles of commerce between the States, was not changed from the time the orders were taken to the time of the delivery to the purchaser."

2nd. The Court erred in refusing Declaration of Law No. 1 as asked by Defendant.

3rd. The Court erred in refusing Declaration of Law No. 2, requested by the Defendant.

4th. The Court erred in refusing declaration No. 3, asked by defendant.

5th. The Court erred in refusing declaration of Law No. 4, as requested by the defendant.

6th. The court erred in refusing Declaration No. 5 requested by defendant.

7th. The Court erred in refusing declaration No. 6 requested by the defendant.

8th. The judgment of the Court is not sustained by the
13 evidence as agreed upon in the agreed statement of facts.

9th. The judgment of the court is contrary to the Law.

10th. The judgment of the Court is contrary to the Law and the said agreed statement of facts.

Wherefore defendant prays for a new trial and other proper relief.

MARSH & FLENNIKEN,
MOORE, SMITH & MOORE,
Attorneys for Defendant.

Endorsement: Filed May 12th, 1910. O. A. Miles, Clerk.

14 In the Union Circuit Court, March Term, 1910.

STATE OF ARKANSAS, Plaintiff,
vs.
E. L. GANAWAY, Defendant.

Bill of Exceptions.

Be it remembered that on the — day of April, 1910, a regular day of the March Term of the Union Circuit Court, this cause came on for hearing before the Honorable Geo. W. Hays, Circuit Judge presiding, a jury having been waived and the following proceedings were had to-wit:

The cause was submitted on the following agreed statement of facts:

(Clerk here copy agreed statement of facts filed in this cause.)

This was all the evidence in the case.

Thereupon the defendant asked the court to find the facts as follows:

The Court refused to give said findings of facts as requested by the defendant, to which refusal the defendant at the time excepted and had his exceptions noted of record.

Whereupon the defendant asked the court to declare the law as follows:

1. That Act No. 97 of the Legislature of Arkansas, approved April 1st, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their Agent is in violation of Section 8, Art. 1 of the Constitution of the United States, and in so far as it does apply is void.

II. That the said Act No. 97 denies to Citizens of other
15 States all privileges and immunities granted to citizens of Arkansas, and is void because violative of Sec. 2, Art. 4, of the Constitution of the United States.

III. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the 14th Amendment to the Constitution of the United States and of Section 18, Art. 2, of the Constitution of Arkansas.

IV. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each County in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

V. That the tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not uniform, and void as being in violation of Section 5, Art. XVI, of the Constitution of Arkansas.

VI. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Com-

pany through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense.

The court refused to give each and every one of the above declarations of law, which were separately requested by the defendant and the defendant at the time severally and separately excepted to the refusal of the Court to give each of the declarations of law and had its exceptions severally and separately noted of record to the refusal of the Court to give each of said declarations of law; and the Court of its own motion found the law as set forth in the agreed statement of facts and upon the same found the defendant guilty and imposed a fine of $200.00, to which judgment of the court the defendant at the time excepted and had its exceptions noted of record.

16 On the same day, being a regular day of the March Term, 1910, of the Union Circuit Court, the defendant files his motion for new trial, which is as follows:

(Clerk her- copy motion for New Trial.)

And the said motion having been heard by the court was overruled, to which ruling of the court in overruling the motion for new trial, the defendant at the time excepted and had his exceptions noted of record and prayed an appeal to the Supreme Court which was granted; and the defendant now presents this his bill of exceptions and asks that the same be signed by the presiding Judge in order that the same may be filed and made a part of the records in this cause, which is accordingly done, this the 12th day of May, 1910.

GEO. W. HAYS,
Circuit Judge of the 13th Judicial Circuit.

Endorsement: Filed May 12th, 1910. O. A. Miles, Clerk.

17 *Certificate.*

THE STATE OF ARKANSAS,
County of Union:

O. A. Miles, Clerk of the Circuit Court, within and for the County and State aforesaid, do hereby certify that the annexed and foregoing 17 pages contain a true and complete transcript of the papers and record orders of the Court as appears from the records and files of this Court.

Witness my hand and official seal this 28th day of May, 1910.

O. A. MILES, *Clerk.*

18 *Filing.*

No. 1485.

E. L. GANAWAY, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Transcript.

Filed May 30th, 1910.

P. D. ENGLISH, *Clerk*,
By J. H. CAMPBELL, *D. C.*

19 *Certiorari.*

STATE OF ARKANSAS:

In the Supreme Court.

The State of Arkansas to the Clerk of the Circuit Court of Union County, Greeting:

Whereas, in a case pending in the Supreme Court of Arkansas, wherein E. L. Ganaway is appellant and The State of Arkansas is appellee, it has been suggested by said appellant that there is a diminution of the record filed in this case, in this: The Clerk in making up the transcript of the record in this cause, has copied the agreed statement of facts upon which said cause was tried, which is on file in the office of said Clerk, but omitted to make any reference, at the place where the same was called for in the bill of exceptions, to the page of the transcript where the same could be found, whereby the said agreed statement of facts is not sufficiently identified as the *as the* agreed statement of facts so called for in said bill of exceptions with a prayer that the record be amended. You are, therefore, hereby commanded that you certify to our Supreme Court, without delay, a full, true and complete transcript of the record of said circuit court, so as above suggested to be diminished; that our Supreme Court, upon consideration of a complete record, may cause to be done therein what should be done. Hereof fail not and make due return of this writ under your official seal.

In testimony whereof, I, P. D. English, Clerk of the Supreme Court, hereunto set my hand and affix the seal of said Court, at my office in the City of Little Rock, this 20th day of June, 1910.

[SEAL.]

P. D. ENGLISH, *Clerk*,
By W. P. SADLER, *D. C.*

20 The following is a correct and true copy of the agreed statement of facts on file in my office in the case of the State of Arkansas against E. L. Ganaway and named in the Bill of Exceptions filed in said cause with me, and the same is all the testimony that was introduced in the trial of said cause in the Circuit Court of Union County, Arkansas.

Statement of Facts.

The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Missouri, in which City and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other Counties of Arkansas and other States of the United States.

The manner and form in which said Company is conducting its business in Union and other Counties of Arkansas is as follows:

R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a Division Superintendent, has general supervision of said Company's business in Union and other Counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said Company known in its business as sample men or salesmen, and two other employees of said Company known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said Company, and none of said employees has any financial or monetary interest in the property of said Company located in Union County, or in the sales or proceeds of sales made by them in said County or elsewhere in the State of Arkansas, other than the compensation hereinbefore referred to.

Each of said employees of said Company known as salesmen is furnished by said Company with a sample range, sample
21 wagon and team and is sent into such territory in Union or other Counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said Company fails to deliver the range so ordered within sixty days from date.

All orders so taken by said salesmen are forwarded by them to said Sutton, who investigates the credit of said purchasers and if same is found satisfactory he proceeds to have said orders filled within sixty days' limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said Company hereinbefore referred to as delivery men, each one of whom is furnished with a delivery wagon and team by said Company for such purpose. All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to are the sole and exclusive property of said Company. Under no circumstances do the employees hereinbefore referred to as salesmen sell, or offer to sell or deliver the sample ranges intrusted to them by said Company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges, orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do

any of said delivery men, sell or offer to sell or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen.

All ranges so owned and manufactured are shipped in car load lots to Union County and other Counties, each car containing sixty separate and distinct ranges, each car being consigned by
22 said Company to itself in case of said R. L. Sutton, its employee.

A car load of ranges was shipped from St. Louis, Missouri to El Dorado, Arkansas, for the purpose of filling orders previously secured by said soliciting agents or traveling salesmen. Upon the arrival of said car at El Dorado the ranges were taken from said car, loaded on said delivery wagon and delivered by said delivery men, to said purchasers in the precise shape, condition, form or packages in which they were delivered by said Company to the Common carrier at St. Louis, Missouri.

At the end of each month said R. L. Sutton settles with each of said Company's employees hereinbefore referred to as salesmen and delivery men, and sends their reports and his own report to said Company, together with all notes taken by said salesmen for the sale of ranges during the month, and all cash in the hands of said Sutton in excess of $500.00 expense money, which he is allowed to retain in order to pay the expenses of conducting said Company's business during the following month.

It is further agreed by and between the State of Arkansas through its prosecuting Attorney and the defendants herein that E. L. Ganaway and W. W. Dennis are salesmen of the said Wrought Iron Range Company and have in Union County, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for ranges and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

That A. C. Crenshaw and P. L. Hagler are acting as delivery men in the employ of said Wrought Iron Range Company and have in the manner hereinbefore set forth delivered Ranges to parties in Union County, Arkansas, who had previously given orders to the said above named salesmen, within twelve months before this time.

That all of said persons above named are hired employees of the said Wrought Iron Range Company and have been arrested
23 and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas.

A copy of the notes taken by the traveling salesmen above named is hereto attached and made a part of this agreed statement of facts.

J. Y. STEVENS,
Prosecuting Attorney.
MARSH & FLENNIKEN,
Attorneys for Defendants.

Endorsement: Filed Jan'y 21, 1910. O. A. Miles, Clerk.

$81.00. P. O. ——, State of ——, 190–.

For value received we, or either of us, promise to pay to Wrought Iron Range Company or order Eighty One Dollars, payable as follows: $40.50 on the first day of Oct., 1910, and $40.50 on the first day of Oct., 1911, without discount or offset, waiving all rights to exemption allowed us by law as to this debt, with interest at six per cent, from date, if not paid when due and presented. This note is given for one "Home Comfort" Range No. —, which —— this day purchased from said Wrought Iron Range Company, to be delivered at —— premises, within sixty days from this date. This note is to be void only upon the condition that the said Wrought Iron Range Company refuse to deliver the said "Home Comfort" Range as above specified, and for no other cause whatever.

Payable .....
County of .....
Witnesses .....
To .....
P. O. .....
Rural Route No. .....
Balance Due ..... Mileage .....

24 STATE OF ARKANSAS,
County of Union:

I, O. A. Miles, Clerk of the Circuit Court of said County, do hereby certify that the foregoing pages marked 1, 2 and 3 respectively, contain a full, true and complete copy of the agreed statement of facts upon which the case of State of Arkansas v. E. L. Ganaway was tried in said court, and is the agreed statement of facts on file in said cause referred to in the bill of exceptions filed by defendant E. L. Ganaway in said cause.

Witness my hand and seal this 24th day of June, A. D. 1910.

[SEAL.]

O. A. MILES,
Circuit Clerk,
By H. G. WILLIAMS, *D. C.*

(Endorsed on Back:) Agreed Statement of Facts in cases of State of Arkansas vs. E. L. Ganaway, W. W. Dennis, A. C. Crenshaw, P. L. Hagler. Before J. P. Tatum, J. P., El Dorado Township. Filed 12-3-1909. J. P. Tatum, J. P. Filed Jan'y 21, 1910. O. A. Miles, Clerk.

25 STATE OF ARKANSAS,
County of Union:

I, O. A. Miles, Clerk of the Circuit Court of said County, hereby certify that I have made out and certified a full, true and complete transcript of the diminution within suggested, which is hereto attached.

In testimony whereof, I hereto set my hand as Clerk and affix the seal of said Circuit Court this 22nd day of June, A. D. 1910.

[SEAL.] O. A. MILES, *Clerk.*

Endorsed on Back: Returned and Filed June 25th, 1910. P. D. English, Clerk, by W. P. Sadler, D. C.

26 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Courthouse, in the city of Little Rock, the following proceedings were had, to-wit: On the 6th day of June, 1910, a day of said term:

A. C. CRENSHAW, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

And

E. L. GANAWAY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

On motion of the Attorney General, leave is granted to brief the above two causes together.

27 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 20th day of June, 1910, a day of said term:

E. L. GANAWAY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

On motion this cause is passed for one week to enable the appellant to sue out a writ of certiorari directed to the clerk of the

circuit court of Union County, requiring him so to certify up to this court the agreed statement of facts upon which this cause was tried as to properly identify the same as the agreed statement of facts called for in the bill of exceptions.

28 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 27th day of June, 1910, a day of said term:

E. L. GANAWAY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

This cause being regularly called, come the parties by their attorneys, and said cause is submitted upon the transcript of the record, and the briefs filed, and by the court taken under advisement.

29 STATE OF ARKANSAS:

In the Supreme Court.

Be it remembered, That at a term of the Supreme Court of the State of Arkansas, begun and held on the 23rd day, being the fourth Monday of May, A. D. 1910, at the Court house, in the City of Little Rock, the following proceedings were had, to-wit: On the 11th day of July, 1910, a day of said term:

E. L. GANAWAY, Appellant,
vs.
THE STATE OF ARKANSAS, Appellee.

Appeal from Union Circuit Court.

Judgment.

This cause came on to be heard upon the transcript of the record of the Circuit Court of Union County, and was argued by counsel, on consideration whereof it is the opinion of the court that there is no error in the proceedings and judgment of said circuit court in this cause.

It is therefore considered by the Court that the judgment of said circuit court in this cause rendered be and the same is hereby in

all things affirmed with costs, and that unless said appellant shall within fifteen juridical days surrender himself to the proper authority in execution of said judgment his bond be declared as forfeited.

It is further adjudged that said appellee recover of said appellant all her costs in this court in this cause expended, and have execution thereof.

Battle & Wood, J. J., dissent.

30 In the Supreme Court of Arkansas, July 11th, 1910.

No. 99.

CRENSHAW and GANAWAY
v.
STATE.

Opinion.

McCULLOCH, *C. J.*:

Appellants were tried before a justice of the peace of Union County and convicted of a charge of violating the peddling statute of 1909, which provides that "before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license," etc. On appeal to the circuit court they were again convicted, and appealed to this court. The case was heard on the following agreed statement of facts: "The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Lous, Mo., in which city and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other counties of Arkansas and other States of the United States.

"The manner and form in which said company is conducting its business in Union and other counties of Arkansas is as follows: R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a division superintendent, has general supervision of said company's business in Union and other counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said company known in the business as sample men or salesmen, and two other employees of said company known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said company, and none of said employees has any financial or monetary interest in the property of said company located in Union County, or in the sales or proceeds of sales made by them in said county or elsewhere in the State of Arkansas, other than compensation hereinbefore referred to.

31 Each of said employees of said company known as salesmen is furnished by said company with a sample range,

sample wagon and team, and is sent into such territory in Union or other counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said company fails to deliver the range so ordered within 60 days from date.

"All orders so taken by said salesmen are forwarded by them to the said Sutton, who investigates the credit of said purchasers, and if same is found satisfactory he proceeds to have said orders filled within 60 days limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said company hereinbefore referred to as deliverymen, each one of whom is furnished with a delivery wagon and team by said company for such purpose.

"All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to, are the sole and exclusive property of said company. Under no circumstances do the employees hereinbefore referred to as salesmen, sell, or offer to sell or deliver, the sample ranges entrusted to them by said company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges, orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said deliverymen sell, or offer to sell, or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen. All ranges so owned and manufactured are shipped in carload lots to Union
County, each car containing 60 separate and distinct ranges,
32 each car being consigned by said company to itself, in care of said R. L. Sutton, its employee.

"A carload of ranges was shipped from St. Louis, Mo., to El Dorado, Ark., for the purpose of filling orders previously secured by said soliciting agents or traveling salesmen. Upon the arrival of said car at El Dorado the ranges were taken from said car, loaded on said delivery wagons and delivered by said deliverymen to said purchasers in the precise shape, condition, form and packages in which they were delivered by said company to the common carrier at St. Louis, Mo. * * *

"It is further agreed by and between the State of Arkansas, through its prosecuting attorney, and the defendants herein, that E. L. Ganaway and W. W. Dennis are salesmen of the Wrought Iron Range Company, and have in Union County, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for them and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

"That A. C. Crenshaw and P. L. Hadler are acting as deliverymen in the employ of said Wrought Iron Range Company, and have in the manner hereinbefore set forth delivered ranges to parties

in Union County, Arkansas, who had previously given orders to the said above named salesmen within twelve months before that time.

"That all of said persons above-named are hired employees of the said Wrought Iron Range Company and have been arrested, and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas." We decided in Ex Parte Byles, 20 Ark. Law Rep. 616, that the statute in question is valid, but it is now insisted that, as applied to the transactions set forth in the statement, it is a burden on interstate commerce, and to that extent void. Appellant Ganaway solicited orders for ranges, and appellant Crenshaw made deliveries thereof after they were ordered and shipped to El Dorado, Ark., for de-
33 livery to the respective purchasers. They were working under the same employer, and pursuant to a plan whereby one was to solicit orders and the other to deliver the articles sold. So if the two acts constituted an offense when performed by one person, its unlawful character would not be changed when performed by two persons, acting in concert, but both would be guilty.

The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute. This definition varies from the common law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words "peddle" and "sell" are used synonymously, but in order to come within the terms of the statute it is essential that a sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be added the element of traveling from place to place, over and through the county, for the purpose of selling, in order for the statute to reach to it. It should also be especially noted that the statute does not discriminate against non-residents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description.

Does the method in which appellants conducted business for their employer exempt them from the operation of the statute? We think not.

The opinion of the Supreme Court of the United States, delivered by Mr. Justice Gray in Emert v. Missouri, 156 U. S. 296, announces the law applicable to the case and sustains the views we express. In that case, the agent of a non-resident manufacturer of sewing machines was engaged in peddling machines in Missouri with-
34 out obtaining a license as required by the statutes of that State. He asserted his right to sell free of license, on the ground that the transaction constituted interstate commerce. All of the prior decisions of that court are reviewed, and the following conclusions announced:

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in

any way, with interstate commerce. Its object, in requiring peddlers to take out and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, and even thefts, which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door. * * * The necessary conclusion upon authority, as well as upon principle is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders."

"It is true, in that case the vendor carried the machines with him from place to place, and made deliveries as he sold them. But we cannot see that that alters the principle, for the legislature has the power to define the act of peddling, and that definition should be upheld by the courts unless it is manifestly evasive.

The other decisions of the Supreme Court of the United States which are relied on by counsel do not conflict with the case above cited. Robbins v. Shelby County Taxing District, 120 U. S. 489, and the line of similar cases in that court, concerned statutes and ordinances imposing license fees on drummers who solicited orders for non-resident merchants, and such legislation was declared to be a burden on interstate commerce. Here, no such burden is imposed, for the license is not demanded merely for soliciting
35 orders, but for peddling.

Leisy v. Hardin, 135 U. S. 100, arose under a statute of Iowa prohibiting the sale of intoxicating liquors without license. That was before the act of Congress known as the Wilson Act, and the court held that the imposition of a license fee on the sale of liquor was a burden on interstate commerce insofar as it applied to imported goods sold in original packages. The present statute, as we have already stated, does not require a license merely to sell, but the license is required to peddle, or sell by traveling from place to place over and through the county.

Caldwell v. North Carolina, 187 U. S. 622, is along the same line, for the ordinance found to be repugnant to the Federal Constitution prohibited the sale and delivery of certain wares (pictures and picture frames) in any manner without procuring license.

In Rearick v. Pennsylvania, 203 U. S. 507, the vendor's agent solicited orders for wares to be shipped into the State from Ohio, and the same were by the vendor in that State appropriated to the fulfillment of the contract of sale, and properly tagged and shipped into the State for delivery to the purchaser. In the present case, the ranges were not separately appropriated to the filling of any particular order. The ranges were not separated and tagged with the name of any purchaser, but the appropriation was made by the agent of the vendor after the goods came into the State. Moreover, the court in that case seems to have treated the condemned ordinance as merely requiring a license for the sale of goods, and not as one

requiring license for peddling, though the ordinance could be construed as applying only to peddlers or street vendors.

We discover no conflict between that decision and the decision in Emert v. Missouri, supra, which we think announces the law of the present case.

Both appellants were properly convicted, and the judgments against them are affirmed.

Battle and Wood, J. J., dissent.

36 In the Supreme Court of Arkansas, July 14, 1910.

No. 126.

CRENSHAW
v.
STATE OF ARKANSAS.

GANAWAY
v.
STATE OF ARKANSAS.

Dissenting Opinion.

BATTLE, *J.:*

Where property in one State is bargained, sold or exchanged by a citizen or corporation of that State to or with a citizen of another, and in the consummation of such transaction is shipped to the other State to the person to whom it has been bargained, sold or exchanged, and reaches its destination, and becomes a part of the general mass of the property of the State to which it is shipped, it becomes subject to taxation in that State.

It was held in American Steel and Wire Company v. Speed, 192 U. S. 500, that "goods brought in original packages from another State, after they have arrived at their destination and are at rest within the State, and are enjoying the protection which the laws of the State afford, may, without violating the commerce clause of the Constitution, be taxed, without discrimination, like other property within the State. Woodruff v. Parham, 8 Wall. 123; Brown v. Houston, 114 U. S. 622; Emert v. Missouri, 156 U. S. 296.

In Robbins v. Shelby Taxing District, 120 U. S. 489, it is said: "As soon as the goods are in the State and become part of its general mass of property, they will become liable to be taxed in the same manner as other property of similar character, as was distinctly held in the case of Brown v. Houston, 114 U. S. 622. When goods are sent from one State to another for sale, or, in consequence of a sale, they become a part of its general property, and amenable to its laws; provided no discrimination be made against them as goods from another State, but only taxed in the usual way as other goods are. Brown v. Houston, qua supra; Machine Co. v.

Gage, 100 U. S. 676; But to tax the sale of such goods, or the offer to sell them, before they are brought into the State, is a very different thing, and seems to us clearly a tax on interstate commerce itself."

37 In Brown v. State of Maryland, 12 Wheaton 419, 441, Mr. Chief Justice Marshall, speaking for the court, said: "It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of property in the country, it has perhaps, lost its distinctive character as an import, and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition in the Constitution."

In Leisy v. Hardin, 135 U. S. 100, 110, it is said: "The point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the importer."

In Emert v. Missouri, 156 U. S. 296, 311, cited in the opinion of this court in this case, the goods for to sell which the peddler was required to pay a license, were a part of the general mass of the property of the State. The court said: "The defendant's occupation was offering for sale and selling sewing machines, by going from place to place in the State of Missouri, without a license. There is nothing in the case to show that he ever offered for sale any machine that he did not have with him at the time. His dealings were neither accompanied nor followed by any transfer of goods, or of any order for their transfer, from one to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic;

38 and, so far as appears, the only goods in which he was dealing had become part of the mass of property within the State. Both the ocupation and the goods, therefore, were subject to the taxing power, and to the police power, of the State.

In Brown v. Houston, 114 U. S. 622, 632, 634, it was held: "Coal mined in Pennsylvania and sent by water to New Orleans to be sold in open market there on account of the owners in Pennsylvania, becomes intermingled, on arrival there, with the general property in the State of Louisiana, and is subject to taxation under the general laws of that State, although it may be after arrival, sold from the vessel on which the transportation was made, and without being landed, and for the purpose of being taken out of the country on a vessel bound to a foreign port."

In speaking of the tax in that case the court said: "It was not a tax imposed upon the coal as a foreign product, or as the product of another State than Louisiana, nor a tax imposed by reason of the coal being imported or brought into Louisiana, nor a tax imposed whilst it was in a State of transit through that State to some other place of destination. It was imposed after the coal had arrived at its destination and was put up for sale. The coal had come to its place of rest, for final disposal or use, and was a commodity in the market of New Orleans. It might continue in that condition for a year or two years. It had become a part of the general mass of property in the State, and as such it was taxed for the current year, as all other property in the City of New Orleans was taxed. * * * It was subject to no discrimination in favor of goods which were the product of Louisiana, or goods which were the property of citizens of Louisiana. It was treated in exactly the manner as such goods were treated."

In the same case the court said: "We do not mean to say that if a tax collector should be stationed at every ferry and railroad depot in the city of New York, charged with the duty of collecting a tax on every wagon load, or car load of produce and merchandise brought into the city, that it would not be a regulation of,
39 and restraint upon interstate commerce, so far as the tax should be imposed on articles brought from other States. We think it would be; and that it would be an encroachment upon the exclusive powers of Congress. It would be very different from the tax laid on auction sales of all property indiscriminately, as in the case of Woodruff v. Parham, which had no relation to the movement of goods from one State to another. It would be very different from a tax laid, as in the present case, on property which had reached its destination, and had become part of the general mass of property of the city, and which was only taxed as a part of that general mass in common with all other property in the city and in precisely the same manner."

But property in one State, bargained, sold, or exchanged by a citizen or corporation of that State to or with a citizen of another, and in the consummation of that transaction shipped to the other State to be delivered to the person to whom it was bargained, sold or exchanged, while in transit, before it reaches its destination, before it comes to a rest, or becomes a part of the general mass of the property of the State to which it is shipped, is a part of the interstate commerce of the country, and, under the commerce clause of the Constitution of the United States, is subject to the exclusive control of Congress.

In Brennan v. Titusville, 153 U. S. 289, it was held: "An ordinance requiring agents soliciting orders on behalf of manufacturers of goods to take out a license and pay a tax therefor, made by a municipal corporation under authority conferred by a statute of the State, granting to such corporations power to levy and collect license taxes on hawkers, peddlers and merchants of all kinds, is an exercise, not of the police power, but of the taxing power; and when it is enforced against an agent, sent by a manufacturer of goods in

another State to solicit orders for the products of his manufactory, it imposes a tax upon interstate commerce, in violation of the provisions of the Constitution of the United States."

To the same effect it has been held in Robbins v. Shelby
40 Taxing District, 120 U. S. 489, 494; Brown v. Maryland, 12 Wheat. 419, 444; Asher v. Texas, 128 U. S. 129; Stokenbery v. Hennick, 129 U. S. 141; Crutcher v. Kentucky, 141 U. S. 47, 61; Stockard v. Morgan, 185 U. S. 27, 37; Caldwell v. North Carolina, 187 U. S. 622; Reorick v. Pennsylvania, 203 U. S. 507; Wrought Iron Range Co. v. Campen, 47 S. E. 658; Gunn v. White Sewing Machine Co. 57 Ark. 24.

"The negotiation of sales of goods which are in another State, for the purpose of introducing them into the State in which the negotiation is made, is interstate commerce." Robbins v. Shelby Taxing District, 120 U. S. 489, 497.

"It is settled that nothing which is a direct burden upon interstate commerce can be imposed by the State without the assent of Congress, and that the silence of Congress in respect to any matter of interstate commerce is equivalent to a declaration on its part that it should be absolutely free." Brennan v. Titusville, 153 U. S. 289, 302; Brown v. Houston, 114 U. S. 622; Leisy v. Hardin, 135 U. S. 100, 109, 113, 114, 123 and 124; Robbins v. Shelby Taxing District, 120 U. S. 489, 493.

In Lyng v. Michigan, 135 U. S. 161, 166, it is said: "We have repeatedly held that no State has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce, and amounts to a regulation of it, which belongs solely to Congress."

The facts in this case are briefly as follows: The Wrought Iron Range Company, a corporation organized under the laws of the State of Missouri, manufactures ranges at its factory in the City of St. Louis, in that State. It has a division superintendent in this State, who looks after and superintends its business in Union and other counties of the State. It has also salesmen and deliverymen.

Each of the salesmen is furnished by it with a sample range,
41 sample wagon and team, and is sent into such territory in Union or other counties as may be designated by the division superintendent, to solicit orders for ranges, manufactured by the company, similar to the sample range furnished him. When he secures an order the purchaser executes his note for the same, which contains an express stipulation that it shall be void in the event the company fails to deliver the range so ordered within sixty days from date, thereby making the order subject to the approval of the company. Such orders are forwarded by the salesmen to the division superintendent, who investigates the credit of the purchaser, and if found satisfactory proceeds to have the order filled within the sixty days. In no case is the salesman allowed to sell the sample range entrusted to him. When the ranges ordered are received they are

delivered to the purchasers by the deliverymen. All money and notes, in excess of the amount necessary to pay expenses, are sent by the division superintendent to the company.

The ranges until sold and delivered form no part of the general mass of property of this State; are not subject to the jurisdiction of this State and are not subject to taxation in the same. The solicitations of the salesmen, the orders of the purchasers and the sales of the ranges are transactions between citizens of two States, and are obviously interstate commerce. The requirement by the statute of April 1, 1909, of the company's employees (if it refers to them) to pay a license fee and to take out a license is a tax on the ranges while subjects of interstate commerce and is a regulation of interstate commerce and as to such persons is of no effect and null and void. Brennan v. Titusville, 153 U. S. 289, 298, 303; Stockard v. Morgan, 185 U. S. 27, 37; Brown v. Maryland, 12 Wheat. 419, 444, 447, 448.

Wood, J., concurs with me in this opinion.

42 *Certificate.*

Supreme Court, State of Arkansas.

I, Peyton D. English, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of E. L. Ganaway, Appellant, vs. The State of Arkansas, Appellee, and also of the opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, this August 1, 1910.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

43 In the Supreme Court of Arkansas.

No. 1485.

E. L. GANAWAY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Assignment of Errors.

Now comes the above appellant and files herewith his petition for writ of error, and says that there are errors in the record of proceedings of the above entitled cause, and for the purposes of having

same reviewed in the Supreme Court of the United States, makes the following assignment:

The Supreme Court of Arkansas erred in holding and deciding that Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, is valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding—

First. That said Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the appellant, and in which he was engaged, and for which he was convicted, is not in violation of Section 8, Article I, of the Constitution of the United States, and that said act is not void in so far as it applies to said business.

Second. That said Act No. 97 does not deny to citizens of other States, and to this appellant as such, all the privileges and immunities granted to citizens of Arkansas, and that it is not void because violative of Section 2, Article IV, of the Constitution of the United States.

Third. That said Act No. 97 does not deny to persons within its jurisdiction the equal protection of the laws, and that it is
44 not void because violative of the 14th Amendment to the Constitution of the United States.

For which errors this appellant prays that the said judgment of the Supreme Court of the State of Arkansas be reversed and a judgment rendered in favor of this appellant, and for costs.

MOORE, SMITH & MOORE,
Attorneys for Appellant.

Filed July 29th, 1910.
PEYTON D. ENGLISH, *Clerk.*

45 In the Supreme Court of Arkansas.

No. 1485.

E. L. GANAWAY, Appellant,
vs.
STATE OF ARKANSAS, Appellee.

Petition for Writ of Error.

Considering himself aggrieved by the final decision of the Supreme Court in affirming the judgment against him in the above entitled case, the appellant hereby prays a writ of error, from the said decision and judgment, to the United States Supreme Court, and an order fixing the amount of a supersedeas bond.

Assignment of errors herewith.

MOORE, SMITH & MOORE,
Attorneys for Appellant.

STATE OF ARKANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by the appellant, E. L. Ganaway, to the State of Arkansas in the sum of Five hundred Dollars, such bond, when approved, to act as a supersedeas.

Dated July 28, 1910.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed July 29, 1910.
PEYTON D. ENGLISH, *Clerk.*

46 No. 1485.

E. L. GANAWAY, Defendant.
vs.
STATE OF ARKANSAS, Appellee.

Bond.

Know all men by these presents:

That we, E. L. Ganaway, as principal, and Sam W. Reyburn and C. M. Connor, as sureties, are held and firmly bound unto the State of Arkansas in the sum of Five Hundred Dollars, to be paid to the said State to which payment well and truly to be made, we bind ourselves jointly and severally by these presents.

Sealed with our seals and dated this 28th day of July, 1910.

Whereas, the above named appellant seeks to prosecute his writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Arkansas;

Now, therefore, the condition of this obligation is such that if the above named appellant shall prosecute his said writ of error to effect, and answer all costs and damages that may be adjudged if it shall fail to make good his plea, then this obligation be void, otherwise to remain in full force and effect.

E. L. GANAWAY,
By W. B. SMITH, *Att'y,*
Principal.
SAM W. REYBURN,
CHAS. M. CONNOR,
Sureties.

STATE OF ARKANSAS,
County of Pulaski, ss:

Sam W. Reyburn and C. M. Connor, being each duly sworn, upon oath depose and say: We are each of lawful age and citizens of the State of Arkansas, and know the contents of the foregoing
47 instrument to which we have attached our names. We each severally say that we are worth the sum of One Thousand

Dollars in this State over and above all debts, liabilities and exemptions.

SAM W. REYBURN.
CHAS. M. CONNOR.

Subscribed and sworn to before me this the 28th day of July, 1910.

[L. S.] R. M. S. BUTNER,
Notary Public.

Bond approved and to operate as a supersedeas.
Dated this 28 day of July, 1910.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Filed July 29, 1910.
PEYTON D. ENGLISH, *Clerk.*

48 UNITED STATES OF AMERICA, *ss:*

Writ of Error.

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Arkansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between the State of Arkansas and E. L. Gannaway, wherein was drawn in question the validity of a treaty or statute of, or an authority evercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said E. L. Gannaway, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said
49 Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being

inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable John M. Harlan, Acting Chief Justice of the United States, the 28th day of July, in the year of our Lord One Thousand Nine Hundred and Ten.

[The Seal of the Circuit Court, Western Division, U. S. A., of East Dist., Ark.]

W. P. FIELD,
Clerk Circuit Court of the United States for the Western Division of the Eastern District of Arkansas.

Allowed:

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Service of this writ acknowledged this 29 day of July, 1910.

HAL L. NORWOOD,
Attorney General, State of Arks.

Filed July 29th, 1910.

PEYTON D. ENGLISH, *Clerk.*

50 SUPREME COURT,
State of Arkansas, ss:

Certificate of Lodgement.

I, Peyton D. English, clerk of the said court, do hereby certify that there was lodged with me as such clerk on July 29th, 1910, in the matter of E. L. Ganaway, versus The State of Arkansas:

1. The original bond of which a copy is herein set forth.
2. Four copies of the writ of error, as herein set forth,—one for each defendant, and one to file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Little Rock, Arkansas, this August 1, 1910.

[Seal of the Supreme Court of Arkansas.]

PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

51 No. 1485.

E. L. GANAWAY, Appellant,
v.
STATE OF ARKANSAS, Appellee.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Arkansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Arkansas, wherein E. L. Ganaway is appellant and you are appellee, to show cause, if any there be, why the judgment rendered against the said appellant, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Arkansas, this 28 day of July, 1910.

E. A. McCULLOCH,
Chief Justice Supreme Court of Arkansas.

Attest:
PEYTON D. ENGLISH,
Clerk Supreme Court of Arkansas.

LITTLE ROCK, ARK., *July 29th,* 1910.

I, Attorney General of the State of Arkansas, appellee in the above entitled cause, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

HAL L. NORWOOD,
Attorney General, State of Arkansas.

Filed July 29, 1910.
PEYTON D. ENGLISH, *Clerk.*

52 UNITED STATES OF AMERICA,
Supreme Court of Arkansas, ss:

Return to Writ of Error.

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Arkansas, in the City of Little Rock, this August 1, 1910.

[Seal of the Supreme Court of Arkansas.]

PEYTON D ENGLISH,
Clerk Supreme Court of Arkansas.

Costs of Suit.

J. P. costs	$4.80
Circuit Court	27.10
Transcript to Sup. Court of Arks.	5.00
Transcript to Supreme Court of U. S.	15.40

Paid by Pl'ff in Error, $15.40.

Attest:

PEYTON D. ENGLISH, *Clerk.*

Endorsed on cover: File No. 22,304. Arkansas Supreme Court. Term No. 128. E. L. Gannaway, plaintiff in error, vs. The State of Arkansas. Filed August 25th, 1910. File No. 22,304.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

NO. 128

E. L. GANNAWAY, PLAINTIFF IN ERROR.

vs.

STATE OF ARKANSAS, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

In the year 1909 the General Assembly of Arkansas passed an Act entitled, "An Act to Regulate the Sale of Lightning Rods, Steel Stove Ranges, Clocks, Pumps, Buggies, Carriages and Vehicles in the Several Counties of This State," the Act being approved April 1, 1909. Its text is as follows:

"Section 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any County and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle or either of said articles, he shall procure a license as hereinafter provided from the County Clerk of such County, authorizing such person to conduct such business.

Section 2. That before any person shall travel over or through any County and peddle or sell any of the articles mentioned above,

he shall pay into the County Treasury of such County the sum of two hundred ($200.00) dollars, taking the receipt of the Treasurer therefor, which receipt shall state for what purpose the money was paid. The County Clerk of such County upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such County and sell such articles or article for a period of one year from the 1st day of January preceding the date of such license.

Section 3. Any person who shall travel over or through any County in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two hundred ($200.00) dollars nor more than five hundred ($500.00) dollars.

Section 4. That any person who shall travel over or through any County in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this Act.

Section 5. All laws and parts of laws in conflict with this Act are hereby repealed and this Act shall take effect and be in force from and after its passage."

On November 27, 1909, on information by the prosecuting attorney of Union County, a warrant of arrest was issued by J. P. Tatum, a justice of the peace, against plaintiff in error, charging him with the offense of peddling or selling steel stove ranges without the license required by the foregoing statute, and on the same date plaintiff in error was arrested upon the warrant. Shortly after he was found guilty and fined two hundred ($200) dollars by the justice of the peace, an appeal being taken to the Union Circuit Court. (Record, pages 1 to 3.) On May 12, 1910, the case was tried in the Union Circuit Court and was submitted to the court upon an agreed statement of facts, a jury being waived. (R. p. 5.) The agreed statement of facts is as follows:

"The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Missouri, in which City and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other Counties of Arkansas and other States of the United States.

The manner and form in which said Company is conducting its business in Union and other Counties of Arkansas is as follows:

R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a Division Superintendent, has general supervision of said Company's business in Union and other Counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said Company known in its business as sample men or salesmen, and two other employees of said Company, known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said Company, and none of said employees has any financial or monetary interest in the property of said Company located in Union County, or in the sales or proceeds of sales made by them in said County or elsewhere in the State of Arkansas, other than the compensation hereinbefore referred to.

Each of said employees of said Company known as salesmen is furnished by said Company with a sample range, sample wagon and team, and is sent into such territory in Union or other Counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one-half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express stipulation that same shall be void as against the purchaser in the event said Company fails to deliver the range so ordered within sixty days from date.

All orders so taken by said salesmen are forwarded by them to said Sutton, who investigates the credit of said purchasers and if same is found satisfactory, he proceeds to have said orders filled within sixty days' limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said Company hereinbefore referred to as delivery men, each one of whom is furnished with a delivery wagon and team by said Company for such purpose. All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to are the sole and exclu-

sive property of said Company. Under no circumstances do the employees hereinbefore referred to as salesmen sell, or offer to sell or deliver the sample ranges intrusted to them by said Company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges, orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said delivery men, sell or offer to sell or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen.

All ranges so owned and manufactured are shipped in car load lots to Union County and other Counties, each car containing sixty separate and distinct ranges, each car being consigned by said Company to itself in care of said R. L. Sutton, its employee.

A car load of ranges was shipped from St. Louis, Missouri, to El Dorado, Arkansas, for the purpose of filling orders previously secured by said soliciting agents or traveling salesmen. Upon the arrival of said car at El Dorado, the ranges were taken from said car, loaded on said delivery wagon and delivered by said delivery men to said purchasers in the precise shape, condition, form or packages in which they were delivered by said Company to the common carrier at St. Louis, Missouri.

At the end of each month said R. L. Sutton settles with each of said Company's employees hereinbefore referred to as salesmen and delivery men, and sends their reports and his own report to said Company, together with all notes taken by said salesmen for the sale of ranges during the month, and all cash in the hands of said Sutton in excess of $500.00 expense money, which he is allowed to retain in order to pay the expenses of conducting said Company's business during the following month.

It is further agreed by and between the State of Arkansas through its prosecuting attorney and the defendants herein that E. L. Gannaway and W. W. Denis are salesmen of the said Wrought Iron Range Company and have in Union County, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for ranges and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

That A. C. Crenshaw and P. L. Hagler are acting as delivery men in the employ of said Wrought Iron Range Company, and have in the manner hereinbefore set forth, delivered ranges to parties in Union County, Arkansas, who had previously given

orders to the said above named salesmen, within twelve months before this time.

That all of said persons above named are hired employees of the said Wrought Iron Range Company, and have been arrested and that neither of said parties nor the Wrought Iron Range Company have paid any license in Union County, Arkansas.

A copy of the notes taken by the traveling salesmen above named is hereto attached and made a part of this agreed statement of facts." (R. pp. 11, 12.)

There was no other evidence in the case.

Plaintiff in error then asked the Circuit Court to declare the law, as follows:

"I. That Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their agent, is in violation of Section 8, Article 1, of the Constitution of the United States, and in so far as it does apply is void.

II. That the said Act No. 97 denies to citizens of other States all privileges and immunities granted to citizens of Arkansas, and is void because violative of Section 2, Article 4, of the Constitution of the United States.

III. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law, and is void because violative of the Fourteenth Amendment to the Constitution of the United States and of Section 18, Article 2, of the Constitution of Arkansas.

IV. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each County in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

V. That the tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not uniform, and void as being in violation of Section 5, Article 16, of the Constitution of Arkansas.

VI. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range

Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense." (R. p. 8.)

The court refused each of the above declarations, exceptions being properly saved to each ruling. (R. p. 6, p. 9).

The court thereupon found plaintiff in error guilty, and imposed a fine of two hundred dollars ($200). (R. p. 5.)

From this judgment plaintiff in error appealed to the Supreme Court of Arkansas, raising in that court the same questions covered by the foregoing declarations of law, and on July 11, 1910, a judgment was entered affirming the judgment of the Union Circuit Court. (R. p. 15.) The opinion of the Supreme Court of Arkansas will be found on pages 16 to 20 of the printed record.

Specification of Errors.

"The Supreme Court of Arkansas erred in holding and deciding that Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, is valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of Arkansas erred in holding and deciding:

First. That said Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the appellant, and in which he was engaged, and for which he was convicted, is not in violation of Section 8, Article 1, of the Constitution of the United States, and that said act is not void in so far as it applies to said business.

Second. That said Act No. 97 does not deny to citizens of other States, and to this appellant as such, all the privileges and immunities granted to citizens of Arkansas, and that it is not void because violative of Section 2, Article 4, of the Constitution of the United States.

Third. That said Act No. 97 does not deny to persons within its jurisdiction the equal protection of the laws, and that it is not void because violative of the Fourteenth Amendment to the Constitution of the United States."

Points and Authorities.

I.

THE ACT OF ARKANSAS OF 1909 IN SO FAR AS IT APPLIES TO THE BUSINESS ENGAGED IN BY PLAINTIFF IN ERROR IS AN UNAUTHORIZED REGULATION OF INTERSTATE COMMERCE, AND AS SUCH IS IN CONFLICT WITH ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

Brown v. Maryland, 12 Wheat, 419.

Robbins v. Shelby Co. Taxing Dist., 120 U. S., 489.

Leloup v. Port of Mobile, 127 U. S., 640.

Asher v. Texas, 128 U. S., 129.

Leisy v. Hardin, 135 U. S., 100.

Brennan v. Titusville, 153 U. S., 289.

Stockard v. Morgan, 183 U. S., 27.

Caldwell v. North Carolina, 187 U. S., 632.

Rearick v. Pennsylvania, 203 U. S., 507.

Dozier v. Alabama, 218 U. S., 124.

II.

DISCUSSION OF THE OPINION OF THE SUPREME COURT OF ARKANSAS.

(A) IT IS IMMATERIAL WHETHER THE ACT OF ARKANSAS OF 1909 BE INTENDED AS A REGULATION OF PEDDLING, AND NOT AS A REGULATION OR LICENSE UPON SOLICITING ORDERS; OR WHETHER IT BE REGARDED AS A POLICE OR A REVENUE MEASURE.

Brown v. Maryland, 12 Wheat, 419, 444.

Robbins v. Shelby Co. Taxing Dist., 120 U. S., 489.

Leloup v. Port of Mobile, 127 U. S., 640.

Brennan v. Titusville, 153 U. S., 289.

W. U. Telegraph Co. v. State, 82 Ark., 314, 315.

Welton v. Missouri, 91 U. S., 275.

Crutcher v. Kentucky, 141 U. S., 47.

(B) IT IS IMMATERIAL WHETHER THE CONTRACT OF SALE OF THE GOODS ORDERED BE EXECUTED IN THE STATE WHERE THE PURCHASER RESIDES, OR IN THE STATE FROM WHICH THE GOODS ARE SHIPPED; AND IT IS IMMATERIAL WHERE TITLE TO THE GOODS PASSES.

Rearick v. Pennsylvania, 203 U. S., 507.

Dozier v. Alabama, 218 U. S., 124.

Caldwell v. N. C., 187 U. S., 632.

Brennan v. Titusville, 153 U. S., 289.

I.

THE ACT OF ARKANSAS OF 1909 IN SO FAR AS IT APPLIES TO THE BUSINESS ENGAGED IN BY PLAINTIFF IN ERROR IS AN UNAUTHORIZED REGULATION OF INTERSTATE COMMERCE AND AS SUCH IS IN CONFLICT WITH ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

The facts in this case are shown in the agreed statement of facts, which appears in the foregoing statement of the case. In that statement the course of business engaged in by plaintiff in error at the time of his arrest for violation of the Peddling Act of 1909 is fully set out. The facts were as follows:

Plaintiff in error's employers, the Wrought Iron Range Company, a manufacturer of stoves and ranges, having its place of business and factory at St. Louis, Missouri, was engaged in the business of selling its product upon orders obtained by its salesmen in the different States; the stoves or ranges being shipped from St. Louis for the purpose of filling orders so obtained. Plaintiff in error was a salesman and engaged in Union County, Arkansas, in taking orders for ranges. The course of his business was to travel through the country carrying a sample stove, which he exhibited to those whose orders he solicited, the sample being merely for the purpose of exhibition and not for sale. Upon obtaining an order plaintiff in error would take a note payable to his principal in two equal installments, the note conditioned to be void upon the Company's failure or refusal to deliver the range within sixty days. After obtaining the orders, no further action of any kind was taken by plaintiff in error or his fellow salesman, except to

turn the orders so obtained over to one R. L. Sutton, an agent of the Wrought Iron Range Company in Union County, whose duty it was to supervise the action of salesmen and deliverymen as to the taking of orders and delivery of ranges, to investigate the financial responsibility of those giving orders, and to send in such orders as were by him approved to the Company at St. Louis. Upon receipt of the orders from Sutton the Company at St. Louis would proceed to fill the same by shipping the ranges from St. Louis in carload lots consigned to itself in care of R. L. Sutton; the ranges being packed separately in the car.

The ranges which were appropriated to the orders obtained in Union County were packed as just set out and consigned to El Dorado. On arrival at that point they were taken from the car by agents of the Range Company known as "delivery men" and delivered to those ordering them in the precise condition and package in which they were delivered by the Range Company to the carrier at St. Louis. The ranges ordered were not delivered to the purchasers by plaintiff in error or any of the salesmen who had taken the orders. This was the business of a second agent, the deliveryman, whose business it was to be at the place of consignment of the ranges for that purpose; nor were any ranges delivered to purchasers, except where their orders had previously been obtained for the same in the manner just stated. It was for soliciting orders for ranges in the manner just described that plaintiff in error was arrested and convicted for violating the Peddling Act of Arkansas, approved April 1, 1909.

The foregoing facts create a single transaction, namely the taking by a salesman of orders for future delivery of goods not at the time of the taking of the order within the State of Arkansas,

and the subsequent shipment into the State of such goods for the purpose of filling the order. The part played by plaintiff in error as a salesman, and by the delivering agent, are merely links or integral parts of one and the same transaction, which amounts to nothing more than the solicitation by a nonresident manufacturer of orders for goods to be appropriated and delivered by him in the future by a shipment from without the State.

On appeal to the Supreme Court of Arkansas it was contended in that court by plaintiff in error that the Act of 1909 should not be so construed as to apply to the course of business pursued by plaintiff in error. It was urged that the statute should be construed to apply only to the itinerant vendor who sells directly the very goods carried with him, and that it does not apply to one taking orders for future delivery either from within or without the State. That question was settled, however, by the opinion of the State Supreme Court and the act was so construed as to apply directly to the taking of orders to be filled by future delivery from without the State. (See Opinion of Supreme Court of Arkansas, Record, pp. 16 and 18.) The State court's decision upon that point not being subject to review, it must be assumed that the statute was directed at the character of business carried on by plaintiff in error, and the question necessarily under consideration now is, whether the Act of 1909 as so applied can be upheld, or whether, in so far as it does so apply, it is not void as an unlawful burden upon legitimate interstate commerce.

The statute itself is precisely similar to those which have been brought up for consideration in the many cases decided by this court upon the question here raised. The first section provides that before any person as owner, manufacturer or agent shall travel over

or through any county and peddle or sell any steel stove ranges, or any of the other articles mentioned, he shall procure a license as hereinafter provided, from the County Clerk; the second section provides that before any person shall travel over or through any County and peddle or sell any of the articles mentioned, he shall pay into the County Treasury the sum of two hundred dollars ($200) taking the Treasurer's receipt therefor; it then provides that the County Clerk shall, upon presentation of the receipt, take it up and issue the holder a ecrtificate or license authorizing him to travel over the County and sell such articles for the period of one year from the 1st day of January preceding the date of the license; the third section makes it a misdemeanor for any person to travel over or through any County peddling or selling, or offering to peddle or sell, any of the enumerated articles without first procuring a license; the fourth section provides that any person traveling over or through any County and peddling or selling any of the enumerated articles shall be deemed a peddler.

The Supreme Court of the State held that the license imposed by the foregoing statute is not a tax upon the article sold, as it is not a license upon the sale; but that it is merely a license upon the occupation of peddling as defined by the State Legislature.

Our contention is, that regardless of form, and regardless of the mode in which the party who takes the orders travels, the statute when applied to and enforced against a person engaged in the business pursued by plaintiff in error is a direct regulation of and burden upon interstate commerce, and is to that extent void.

The question is not new in this court. The principles involved were thoroughly discussed in the case of Brown v. Maryland, 12 Wheat., 419. Since then the question has been completely settled,

and settled favorably to plaintiff in error's contention by the cases cited in the foregoing list of authorities, see page 7.

Those cases are all in point on the facts. They are cases in which license fees were sought to be imposed either by State statute or City ordinance upon the business of those soliciting orders for non-resident principals, the orders to be filled by delivery of the articles ordered from without the State; and in each case the regulation was held to be a direct and unwarranted burden upon commerce between the States.

In Robbins v. Shelby County Taxing District, it appeared that Robbins was engaged in the taxing district of Shelby County, Tennessee, in soliciting orders by the use of samples for his principal, a house doing business in Cincinnati. He was arrested for soliciting without a license under a State statute providing that all drummers and those not having a regular license to do business in the taxing district, and offering for sale and selling goods by sample should be required to pay a stated license fee. This court held that the solicitation in one State of orders for goods to be shipped therein from another State is a legitimate exercise of interstate commerce, and that the laying of a license tax theron is a direct regulation or interference therewith, and as such void, the court saying:

"But it will be said that a denial of this power of taxation will interfere with the right of the State to tax business pursuits and callings carried on within its limits, and its right to require licenses for carrying on those which are declared to be privileges. This may be true to a certain extent; but only in those cases in which the States themselves, as well as individual citizens, are subject to the restraints of the higher law of the Constitution. And this interference will be very limited in its operation. It will only prevent the levy of a tax, or the requirement of a license, before making negotiations in the conduct of interstate commerce; and it may well

be asked where the State gets authority for imposing burdens on that branch of business any more than for imposing a tax on the business of importing from foreign countries, or even on that of postmaster or United States marshal. * * * It seems to be forgotten, in argument, that the people of this country are citizens of the United States as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

The ruling in the above case was followed in the case of Asher v. Texas, *supra,* which is directly in point on the facts, and in the case of Leloup v. Port of Mobile and Leisy v. Hardin, *supra.*

In the case of Brennan v. Titusville, *supra,* plaintiff in error was a traveling agent for J. A. Shepherd, a manufacturer of picture frames, and maker of portraits, residing in Chicago where was located his factory and place of business. While engaged in Pennsylvania in soliciting orders for future delivery of pictures and picture frames plaintiff in error was arrested under a City ordinance requiring all persons canvassing or soliciting in the City of Titusville orders for goods, books, etc., or the persons delivering the same under orders, to obtain a license therefor. In stating the question presented for decision the court say:

"The question in this case is, whether a manufacturer of goods which are unquestionably legitimate subjects of commerce, who carries on the business of manufacturing in one State, can send an agent into another State to solicit orders for the product of his manufactory without paying to the latter State a tax for the privilege of thus trying to sell his goods, * * *"

After quoting from Brown v. Maryland, *supra,* the court say:

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; and if the State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible. And, notwith-

standing the fact that the regulation of interstate commerce is committed by the Constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it."

In the above case all the previous cases are reviewed and it is held that a license tax may not be imposed by a State upon the solicitation of orders by a nonresident dealer for goods to be shipped by the dealer from another State to fill such orders; and it is further held that the form or guise of the tax or license is wholly immaterial so long as, in its effect, it does directly operate upon the business.

The same rule is applied in the case of Stockard v. Morgan, *supra*, where a statute similar in its effect to that in the case at bar was under consideration, and where it was held invalid, the court saying:

"We think it violates the interstate commerce clause of the Constitution of the United States, and that this court has in several cases decided the principle which invalidates the statute so far as it affects the business of the complainant."

The first case in which it appeared that the nonresident principal not only solicited the orders directly through his agent, but also through another agent actually delivered the goods ordered, which the court will note are the facts in the case at bar, was that of Caldwell v. North Carolina, *supra*. In that case the defendant, Caldwell, an employee of the Chicago Portrait & Furniture Company, came to Greensboro for the purpose of delivering certain pictures and frames for which orders had previously been solicited by another agent of the Company, who had preceded the defendant in Greensboro. Caldwell obtained from the railway freight office a large package of pictures and frames, which had been shipped to Greensboro consigned to the Company. After carrying the package to his room he broke the bulk, placed the pictures in their proper

frames and delivered them one at a time to the purchasers. He was arrested under an ordinance providing that every person engaged in selling or delivering picture frames, pictures, etc., whether on previous orders or otherwise, should pay a license fee. The Supreme Court of North Carolina attempted to distinguish the case from that of Brennan v. Titusville, upon the point that the shipments were not made direct to the purchasers but were consigned to the Company, or its agent, at Greensboro for delivery. That distinction was by this court held immaterial, the court saying:

"Nor does the fact that these articles were not shipped separately and directly to each individual purchaser, but were sent to an agent of the vendor at Greensboro, who delivered them to the purchasers, deprive the transaction of its character as interstate commerce. It was only that the vendor used two instead of one agency in the delivery. It would seem evident that, if the vendor had sent the article by an express company, which should collect on delivery, such a mode of delivery would not have subjected the transaction to State taxation."

We submit that in view of the holding in the Caldwell case, the law applicable to the case at bar is completely settled. There could be no more complete an array of authorities upon any given question than is afforded by the foregoing cases. The facts in the case at bar present merely the solicitation, by a nonresident dealer, of orders for steel stove ranges and the subsequent appropriation and shipping of ranges into the State of Arkansas from St. Louis, Missouri, to be applied upon such orders. No ranges were sold and delivered by plaintiff in error; his business consisted merely in soliciting orders for ranges, to be filled by subsequent shipment from St. Louis. No ranges were delivered by him, nor were any delivered by his principal, or any of its delivering agents, that had not been shipped in for delivery upon previous orders. The whole transaction, namely the solicitation of the orders, the shipment of

the ranges from St. Louis and the delivery of such ranges to the purchasers constitutes clearly a part of interstate commerce.

The principle established in the foregoing cases has been followed in Rearick v. Pennsylvania and Dozier v. Alabama, *supra*, which are the two latest decisions of this court that we have been able to find upon the subject. Those cases affirm the decisions just discussed.

We submit that under the doctrine of this court the business engaged in by plaintiff in error was a part of interstate commerce, and that the imposition of the license fee exacted by the statute of Arkansas of 1909 for the doing of such business, was a direct burden upon interstate commerce; and that the statute, therefore, in so far as it applies to plaintiff in error while so engaged is void.

II.

DISCUSSION OF THE OPINION OF THE SUPREME COURT OF ARKANSAS.

(A) IT IS IMMATERIAL WHETHER THE ACT OF ARKANSAS OF 1909 BE INTENDED AS A REGULATION OF PEDDLING AND NOT AS A REGULATION OR LICENSE UPON SOLICITING ORDERS; OR WHETHER IT BE REGARDED AS A POLICE OR REVENUE MEASURE.

The opinion of the Supreme Court of Arkansas will be found on pages 16 to 20 of the printed record.

The court in that opinion endeavored to distinguish the statute in the case at bar in its effect upon the soliciting of orders by a non-resident dealer, from the cases heretofore cited by holding that the Arkansas statute does not reach to mere sales and does not impose a license fee for soliciting orders, but that it is directed toward the

act of peddling, and that the license is demanded for that occupation. The court say: (R. p. 19.)

"The other decisions of the Supreme Court of the United States which are relied on by counsel do not conflict with the case above cited. Robbins v. Shelby County Taxing District, 120 U. S., 489, and the line of similar cases in that court, concerned statutes and ordinances imposing license fees on drummers who solicited orders for nonresident merchants, and such legislation was declared to be a burden on interstate commerce. Here, no such burden is imposed, for the license is not demanded merely for soliciting orders, but for peddling."

On page 18 of the record the following language appears:

"The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be added the element of traveling from place to place, over and through the County, for the purpose of selling, in order for the statute to reach to it."

And further in their opinion in discussing the case of Rearick v. Pennsylvania, *supra*, the court say:

"Moreover, the court in that case seems to have treated the condemned ordinance as merely requiring a license for the sale of goods, and not as one requiring license for peddling, though the ordinance could be construed as applying only to peddlers or street vendors."

In other words, according to the above decision the statute in question does not require a license for the mere act of taking an order, but does require a license where the party taking the order travels over and through a County in a wayfaring way, even though for the sole purpose of taking orders for a nonresident principal. As construed by the State court it classifies that occupation or business as peddling and requires a license of two hundred dollars per annum to be paid by the solicitor or nonresident principal for the privilege of following it. In a word, it is said the tax is not upon the sale of the article or the article itself, but merely

upon the occupation. It is apparent that this is substituting form for reality. The question for consideration is not the guise of the regulation but its substance, and how it in reality affects the business. The same position was taken in Brown v. Maryland, and in passing upon it Chief Justice Marshall said:

"But should it be proved that a duty on the article itself would be repugnant to the Constitution, it is stilll argued that this is not a tax upon the article, but on the person. A State, it is said, may tax occupations, and this is nothing more.

It is impossible to conceal from ourselves that this is varying the form without varying the substance. It is treating a prohibition which is general, as if it were confined to a particular mode of doing the forbidden thing. All must perceive that a tax on the sale of an article imported only for sale is a tax on the article itself."

In Robbins v. Shelby County Taxing District, *supra*, the court, in answering a like contention, say:

"The mere calling the business of a drummer a privilege can not make it so. Can the State Legislature make it a Tennessee privilege to carry on the business of importing goods from foreign countries? If not, has it any better right to make it a State privilege to carry on interstate commerce? It seems to be forgotten in argument that the people of this country are citizens of the United States as well as of the individual States, and that they have some rights under the Constitution and laws of the former independent of the latter, and free from any interference or restraint from them."

Indeed, the Supreme Court of Arkansas has answered its own contention in the case of Western Union Telegraph Company v. State, *supra*, where it is said:

"It must be readily conceded, and is conceded in argument by counsel for the State, that it is beyond the power of the State under the guise either of a license tax or a police regulation, to impose burdens upon interstate commerce or to deny a foreign corporation the right to engage in such commerce in the State. This question is now too well settled to be debated."

We deem it unnecessary to devote further space to this point. It is not now open to question that the solicitation of orders in one State for goods to be shipped from without that State and applied upon such orders constitutes a part of interstate commerce. It is just as purely a transaction of interstate commerce to take such orders by traveling over and through the County as it is to stop at a hotel in a City and visit customers in the business district. To demand a license, therefore, for traveling over and through the County when the traveling is done for the sole purpose of soliciting such orders is, unquestionably, in its operation the imposition of a license upon the soliciting of the orders and therefore a direct regulation of interstate commerce. If the Legislature can not impose a burden upon the business of obtaining such orders when done in one way, how does it obtain the right to so burden it when conducted in another way? Any attempt on the part of the State to prescribe or burden the way in which interstate commerce may be carried on is necessarily a direct regulation of commerce itself. The position of the Supreme Court of Arkansas results in putting it in the power of the State Legislature by the mere force of definition to make the carrying on of interstate commerce peddling and tax it directly as such. It is perfectly apparent that it is immaterial whether the tax is called a license for the sale of good or a license for peddling, so long as it is a direct interference with commerce between the States; and that such a statute as the one in question is, when applied to the kind of business carried on by plaintiff in error, a direct interference with commerce between the States, is too well settled by the decisions of this court to be now questioned.

In this connection, the court will note that the Supreme Court of Arkansas based its decision largely upon the case of Emert v. Missouri, 156 U. S. 296, where this court held that a statute of

Missouri defining those who should be classed as peddlers and requiring them under a penalty to take out and pay for licenses was a valid exercise of the power of the State Legislature, and not repugnant to the commerce clause as applied to one peddling goods which he had previously received from a nonresident manufacturer. In that case, however, there was no element of interstate commerce involved in the dealing of the plaintiff in error. As is shown in the opinion of Justice Gray, the occupation consisted merely in going from place to place in a wagon and selling sewing machines, which he had with him at the time; and there was no evidence to show that he ever offered for sale any machine that he did not actually have with him. To quote from the opinion:

"His dealings were neither accompanied nor followed by any transfer of goods, or any order for that transfer, from one State to another; and were neither interstate commerce in themselves, nor were they in any way directly connected with such commerce. The only business or commerce in which he was engaged was internal and domestic * * *."

The decision in the Emert case was based entirely, therefore, upon the action of an itinerant vendor offering for sale the very machines carried by him through the country, for which no order had ever been taken before being brought into the State. The decision goes no further than to hold that so far as the business of the internal peddling of goods already within the State and a part of the mass of the property therein is concerned, the Legislature in the exercise of its regulatory power may, of course, define and regulate such business as peddling. The case may therefore as well be eliminated from further discussion.

In the cases of Rogers and Barnhill against the State, 144 S. W. Rep. 211, cases presenting the same question raised in the case at

bar, and involving precisely the same statute, the Supreme Court of Arkansas construed the statute as a police regulation for the protection and security of the citizens.

In Brennan v. Titusville, *supra*, it was questioned by the court whether it was bound, in cases of this character, by the opinion of the State court as to whether the legislation was in the nature of a revenue measure or a police regulation; and in effect it was held that the opinion of the State court was not conclusive, and that it would not be conclusive even should the statute itself be entitled as a police regulation. Waiving that point, however, the court, after a thorough review of the cases, held that even should it be concluded by the opinion of the State court that the statute was passed in the exercise of the police power, yet the statute being a direct burden upon interstate commerce, it could not be sustained, whatever its nature. This holding has never been departed from. While it must be conceded that the States in the exrcise of the police power may pass legislation which may indirectly and incidentally affect interstate commerce, the legislation being of a local character in the interest of the health, safety, morals or convenience of the people, yet it is well settled that this power does not authorize legislation which directly affects and imposes a burden upon such commerce, and it is equally well settled that the imposition of a license tax under whatever form or guise upon the solicitation of orders for goods to be shipped from another State for the purpose of filling the order is a direct burden upon interstate commerce.

The above views are amply sustained by Robbins v. Shelby County Taxing District, 120 U. S., 493, 494, Welton v. Missouri, 91 U. S. 275, Leloup v. Port of Mobile, 127 U. S., 640, and Crutcher v. Kentucky, 141 U. S., 47.

(B) IT IS IMMATERIAL WHETHER THE CONTRACT OF SALE OF THE GOODS ORDERED BE EXECUTED IN THE STATE WHERE THE PURCHASER RESIDES OR IN THE STATE FROM WHICH THE GOODS ARE SHIPPED; AND IT IS IMMATERIAL WHERE TITLE TO THE GOODS PASSES.

In the course of the opinion of the State Supreme Court, on page 19 of the record, the court states that in the case of Rearick v. Pennsylvania, *supra*, the goods shipped to fill the orders were, by the vendor in the State from which they were shipped, appropriated to the fulfilment of the contract of sale by being properly tagged. It is then said that in the present case the ranges were not separately appropriated to the filling of any particular order, not being separated or tagged with the name of any purchaser.

Under the decisions of this court we think that point immaterial. The appropriation of the ranges to the orders previously given for them was the loading of the ranges on the car at St. Louis and shipping them to Union County, Arkansas, for the purpose of being applied on those orders. Whether or not the transaction amounts to interstate commerce depends upon broader grounds than the original package doctrine or the question of where title passes. The question is determined by the physical character of the transaction, namely whether it is a transaction or negotiation between parties in different States looking to the shipment of goods from the State of the vendor to the State of the party giving the order to be applied on the order. The question of whether each particular article it tagged with the name of the purchaser is not raised or regarded as of any importance in any of the cases cited. We might cite as an instance Caldwell v. North Carolina, where the pictures and

frames for pictures for different purchasers were packed together in large packages, were opened by the agent on their arrival, and the pictures then for the first time separated and put into their proper frames.

The same is true in the case of Brennan v. Titusville, *supra;* in fact this question was settled in Rearick v. Pennsylvania.

The question as to whether title to the ranges passed before or after their introduction into Arkansas is immaterial. It was held in Rearick v. Pennsylvania, and in Dozier v. Alabama, that that question is of no weight in determining whether the transaction properly comes within the definition of interstate commerce. Such was the express holding of the Rearick case, it being stated that:

"Commerce among the several States is a practical conception not drawn from the witty diversities of the law of sales."

In Dozier v. Alabama the same ruling was made, the court saying:

"But as was hinted in Rearick v. Pennsylvania, what is commerce among the States, is a question depending upon broader considerations than the existence of a technically binding contract or the time and place where title passed."

In that case it was clear, and indeed was conceded, that the title to the picture frames did not pass to the purchaser until delivery within the State of Alabama and after the purchaser had agreed to buy the frames along with the picture, which he had previously ordered.

Conclusion.

In the light of the foregoing authorities and the facts of the case at bar, in conclusion we submit that the plaintiff in error at the time

of his arrest for violation of the Peddling Statute of 1909 was engaged in the solicitation of orders in a business purely interstate in character. The solicitation of the orders was the negotiation of transactions involving the transfer of property from one State into another to be applied upon orders previously obtained in the State into which the goods were transferred or shipped. It is clear that the license required by the statute, whether it be imposed upon the soliciting of the order or sale of the article, or whether by an ingenious distinction it is said to be imposed upon the act of peddling or taking orders when traveling over or through the County, is, without doubt, in fact an imposition or tax upon the sale of the article and therefore upon commerce between the States.

We therefore respectfully submit that in so far as the Act of April 1, 1909, applies to the business engaged in by plaintiff in error at the time of his arrest, it is void, and that the judgment of the Supreme Court of the State of Arkansas should be reversed.

Respectfully submitted,

JOHN M. MOORE.

For Plaintiff in Error.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1912

E. L. GANNAWAY.....*Plaintiff in Error,*

v. No. 128.

THE STATE OF ARKANSAS.....*Defendant in Error.*

IN ERROR TO THE SUPREME COURT OF ARKANSAS.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT OF THE CASE.

The General Assembly of Arkansas, on April 1, 1909, passed an act entitled: "An Act to regulate the sale of lightning rods, steel stove ranges, clocks, pumps, buggies, carriages and vehicles in the several counties of this State." This act is in words and figures as follows, towit:

"Section 1. That hereafter before any person, either as owner, manufacturer or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy, carriage or other vehicle, or either of said articles, he shall procure a license as hereinafter provided from the county clerk of such county, authorizing such person to conduct such business.

"Sec. 2. That before any person shall travel over or through any county and peddle or sell any of the articles mentioned above, he

shall pay into the county treasury of such county the sum of two hundred dollars ($200), taking the receipt of the treasurer therefor, which receipt shall state for what purpose the money was paid. The county clerk of such county upon the presentation of such receipt shall take up the same and issue to such person a certificate or license, authorizing such person to travel over such county and sell such articles or article for a period of one year from the 1st day of January preceding the date of such license.

"Sec. 3. Any person who shall travel over or through any county in this State and peddle or sell, or offer to peddle or sell any of the above enumerated articles without first procuring the license herein provided for shall be deemed guilty of a misdemeanor and upon conviction shall be fined in any sum not less than two hundred dollars ($200) nor more than five hundred dollars ($500).

"Sec. 4. That any person who shall travel over or through any county in this State and peddle or sell any of the articles mentioned above, shall be deemed and held to be a peddler, under the provisions of this act.

"Sec. 5. All laws and parts of laws in conflict with this act are hereby repealed, and this act shall take effect and be in force from and after its passage."

The plaintiff in error was convicted before a justice of the peace of Union county, Arkansas, for a violation of this statute. The information filed against him charged him with the offense of peddling or selling steel stove ranges without the license required by the foregoing statute. Upon appeal to the Union Circuit Court the case was submitted to the court, sitting as a jury, upon the following agreed statement of facts (R. 10-12):

"The Wrought Iron Range Company is a corporation organized under the laws of Missouri, with its general offices located at St. Louis, Mo., in which city and State it also has a factory at which are manufactured the ranges sold by its traveling salesmen throughout Union and other counties of Arkansas and other States of the United States.

"The manner and form in which said company is conducting its business in Union and other counties of Arkansas is as follows:

"R. L. Sutton, an employee of the Wrought Iron Range Company, and known as a division superintendent, has general supervision of said company's business in Union and other counties of Arkansas. Under the immediate supervision and direction of said Sutton are other employees of said company known in its business as sample men or salesmen, and two other employees of said company, known in its business as delivery men. All of said employees are paid for their services stipulated compensations by said company, and none of said employees has any financial or monetary interest in the property of said company located in Union county, or in the sales or proceeds of sales made by them in said county or elsewhere in the State of Arkansas, other than the compensation hereinbefore referred to.

"Each of said employees of said company known as salesmen is furnished by said company with a sample range, sample wagon and team, and is sent into such territory in Union or other counties as may be designated by said Sutton, to solicit orders for ranges similar to the sample range exhibited to prospective purchasers. Where orders for ranges are taken by said salesmen the purchaser signs a note or order, one-half payable in October, 1910, and the other half payable in October, 1911. Said note or order contains an express

stipulation that same shall be void as against the purchaser in the event said company fails to deliver the range so ordered within sixty days from date.

"All orders so taken by said salesmen are forwarded by them to said Sutton, who investigates the credit of said purchasers and if same is found satisfactory he proceeds to have said orders filled within sixty days' limit. Such deliveries of the ranges so sold or ordered are made through or by the employees of said company hereinbefore referred to as delivery men, each one of whom is furnished with a delivery wagon and team by said company for such purpose. All the sample ranges, all ranges delivered to said purchasers, all the sample wagons and teams, and all the delivery wagons and teams hereinbefore referred to are the sole and exclusive property of said company. Under no circumstances do the employees hereinbefore referred to as salesmen sell, or offer to sell or deliver the sample ranges intrusted to them by said company. Under no circumstances does any one of said salesmen deliver to purchasers the ranges orders for which have been taken either by himself or any other of said salesmen. Under no circumstances do any of said delivery men sell or offer to sell or take orders for ranges, or to deliver any ranges other than those for which orders have previously been taken by the employees hereinbefore referred to as salesmen.

"All ranges so owned and manufactured are shipped in car load lots to Union county and other counties, each car containing sixty separate and distinct ranges, each car being consigned by said company to itself, in care of R. L. Sutton, its employee.

"A car load of ranges was shipped from St. Louis, Mo., to El Dorado, Ark., for the purpose of filling orders previously secured

by said soliciting or traveling salesmen. Upon the arrival of said car at El Dorado, the ranges were taken from said car, loaded on said delivery wagon, and delivered by said delivery men to said purchasers in the precise shape, condition, form or packages in which they were delivered by said company to the common carrier at St. Louis, Mo.

"At the end of each month said R. L. Sutton settles with each of said company's employees hereinbefore referred to as salesmen and delivery men, and sends their reports and his own report to said company, together with all notes taken by said salesmen for the sale of ranges during the month, and all cash in the hands of said Sutton in excess of $500 expense money, which he is allowed to retain in order to pay the expenses of conducting said company's business during the following month.

"It is further agreed by and between the State of Arkansas through its prosecuting attorney and the defendants herein that E. L. Gannaway and W. W. Denis are salesmen of the said Wrought Iron Range Company and have in Union county, Arkansas, within the last twelve months exhibited sample ranges and solicited and taken orders for ranges, and have taken notes for the same, doing all of said business in the manner hereinbefore stated.

"That A. C. Crenshaw and P. L. Hagler are acting as delivery men in the employ of said Wrought Iron Range Company and have in the manner hereinbefore set forth delivered ranges to parties in Union county, Arkansas, who had previously given orders to the said above named salesmen, within twelve months before this time.

"That all of said persons above named are hired employees of the said Wrought Iron Range Company and have been arrested, and

that neither of said parties nor the Wrought Iron Range Company have paid any license in Union county, Arkansas.

"A copy of the notes taken by the traveling salesmen above named is hereto attached and made a part of this agreed statement of facts."

Plaintiff in error asked the circuit court to declare the law as follows:

"1. That Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the defendant for the Wrought Iron Range Company, as their agent, is in violation of section 8, article 1, of the Constitution of the United States, and in so far as it does apply is void.

"2. That the said Act No. 97 denies to citizens of other States all privileges and immunities granted to citizens of Arkansas, and is void because violative of section 2, article 4, of the Constitution of the United States.

"3. That the said Act No. 97 denies to persons within its jurisdiction the equal protection of the law and is void because violative of the Fourteenth Amendment to the Constitution of the United States and of section 18, article 2, of the Constitution of Arkansas.

"4. That the taxes or fee imposed by the said Act No. 97 upon each and every person engaged in each county in the State in the sale of the articles enumerated in the act as a privilege of selling said articles is excessive, and if considered as an act for the purpose of licensing and taxing for regulation is void on its face.

"5. That the tax or fee imposed by the said Act No. 97, if considered as a tax for the purpose of revenue, is unequal and not

uniform, and void as being in violation of section 5, article 16, of the Constitution of Arkansas.

"6. That said Act No. 97 was designed to regulate peddling and that the business as conducted by the Wrought Iron Range Company through its salesmen, of which the defendant is one, is not peddling and the defendant has not therefore committed an offense" (R. pp. 5 and 8).

The court refused each of the above declarations, exceptions being properly saved to each ruling (R. p. 8).

The court thereupon found plaintiff in error guilty, and imposed a fine of two hundred dollars ($200) (R. p. 5).

Upon appeal to the Supreme Court of Arkansas the judgment of the circuit court was affirmed (R. p. 15).

The following specifications of error were filed by plaintiff in error:

"The Supreme Court of Arkansas erred in holding and deciding that Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, is valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

"The said errors are more particularly set forth as follows:

"The Supreme Court of Arkansas erred in holding and deciding:

"First. That said Act No. 97 of the Legislature of Arkansas, approved April 1, 1909, as applied to the business conducted by the appellant, and in which he was engaged, and for which he was con-

victed, is not in violation of section 8, article 1, of the Constitution of the United States, and that said act is not void in so far as it applies to said business.

"Second. That said Act No. 97 does not deny to citizens of other States, and to this appellant as such, all the privileges and immunities granted to citizens of Arkansas, and that it is not void because violative of section 2, article 4, of the Constitution of the United States.

"Third. That said Act No. 97 does not deny to persons within its jurisdiction the equal protection of the laws, and that it is not void because violative of the Fourteenth Amendment to the Constitution of the United States."

By this writ of error there is drawn in question the validity of the act of the Arkansas Legislature set forth above in so far as it applies to the course of dealing pursued by plaintiff in error.

POINTS AND AUTHORITIES.

I.

THE SUPREME COURT OF ARKANSAS HAS CONSTRUED THE ACT OF 1909 AS AN EXERCISE OF THE POLICE POWER INHERENT IN THE STATE—THAT CONSTRUCTION IS CONCLUSIVE UPON THIS COURT.

The opinion below:

Barnhill v. State, 144 S. W. (Ark.), 211.

Pabst Brewing Co. v. Crenshaw, 198 U. S. 17.

Cargill Co. v. Minn., 180 U. S. 452.

Delamater v. S. D., 205 U. S. 93.

Atlantic Coast Line Ry. Co. v. Mazursky, 216 U. S. 122.

Hammand Packing Co. v. State of Ark., 212 U. S. 322.

Armour Packing Co. v. Lacey, 200 U. S. 226.

Kahrer v. Stewart, 197 U. S. 60.

Pullman Co. v. Adams, 189 U. S. 426.

Osborne v. Florida, 164 U. S. 650.

II.

THE PEDDLING ACT OF 1909 AS APPLIED TO THE FACTS IN THIS CASE IS IN NO JUST SENSE A REGULATION OF INTERSTATE COMMERCE, BUT IS A RIGHTFUL AND PROPER EXERCISE OF THE POLICE POWER INHERENT IN THE STATE AND IS NEITHER ARBITRARY, UNREASONABLE NOR CONTRARY TO ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

Sherlock v. Alling, 93 U. S. 99.

Cruther v. Kentucky, 141 U. S. 47.

Nashville, etc., Ry. Co. v. Alabama, 128 U. S. 96.

Chicago, Milwaukee, etc., Ry. Co. v. Solan, 169 U. S. 133.

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L. S. & M. S. Ry. Co. v. Ohio, 133 U. S. 286.

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Ozan Lbr. Co. v. Union Co. Bank, 207 U. S. 251.

III.

THE INSTANT CASE MAY BE CLEARLY DISTINGUISHED FROM THE CASES CITED AND RELIED UPON BY PLAINTIFF IN ERROR.

ARGUMENT.

I.

THE SUPREME COURT OF ARKANSAS HAS CONSTRUED THE ACT OF 1909 AS AN EXERCISE OF THE POLICE POWER INHERENT IN THE STATE. THAT CONSTRUCTION IS CONCLUSIVE UPON THIS COURT.

The "Peddling Act" of 1909, the validity of which is drawn in question, has been construed by the Supreme Court of Arkansas as an exercise of the police power. (See opinion below.)

In *Barnhill* v. *State, supra,* the Supreme Court of Arkansas had occasion again to construe the act in question. We quote the following from the opinion in that case:

"The gist of the offense created by this statute does not consist of making sales without license but in peddling without license. As is held in the case of *Crenshaw* v. *State, supra,* in order to constitute peddling there must be the element of traveling from place to place, over and through the county, for the purpose of making sales. The statute does not declare it an offense to make sales, nor does it seek to impose a license fee or tax on sales, but only makes it an offense for one to go about from place to place, from residence to residence, in and through the county in the prosecution of a wayfaring business, without procuring license, whether in making sales or in taking orders. As was said relative to a statute quite similar to this by the Supreme Court of the United States, 'Its object in requiring peddlers to take out and pay for licenses and to exhibit their licenses on demand to any peace officer or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds and even thefts which, as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door.' *Emert* v. *Missouri,* 156 U. S. 296. This statute is directed at an itinerant occupation which may endanger the peace and safety of the citizens of the State and not at a business which only involves the sale of property. It is but the exercise of the police power of the State, and, as was said in the above case of *Emert* v. *Missouri, supra,* "it is

nowise repugnant to the power of Congress to regulate commerce among the several States but is a valid exercise of the power of the State over persons in business within its borders.'"

The Supreme Court of Arkansas upheld the validity of this statute as a police regulation. That construction, thus placed upon the act by the highest court of Arkansas, is binding here.

In *Pabst Brewing Co.* v. *Crenshaw, supra,* this court refused to review the determination of the State court that the statute involved in that case was not a revenue but an inspection measure.

In *Delamater* v. *South Dakota, supra,* this court, speaking through its present Chief Justice, said:

"The contention that the law of South Dakota was a taxing law and not a police regulation, and therefore within the purview of the Wilson act, is in conflict with the purpose of that law as interpreted by the Supreme Court of South Dakota."

Other cases sustaining the rule here involved that the construction placed upon the act of a State Legislature by the highest court of the State, both as to the purpose and terms of the statute, is conclusive upon this court, have been cited *supra.* We deem it unnecessary to further discuss the question.

II.

THE PEDDLING ACT OF 1909 AS APPLIED TO THE FACTS IN THIS CASE IS IN NO JUST SENSE A REGULATION OF INTERSTATE COMMERCE, BUT IS A RIGHTFUL AND PROPER EXERCISE OF THE POLICE POWER INHERENT IN THE STATE AND IS NEITHER ARBITRARY, UNREASONABLE NOR CONTRARY TO ARTICLE 1, SECTION 8, OF THE CONSTITUTION OF THE UNITED STATES.

In view of the many previous decisions of this court it can not be doubted that the State may adopt many regulations of a purely local character which, though they indirectly affect interstate commerce and the instrumentalities engaged in such commerce, yet they are not, within the meaning of the Constitution, a regulation of, or burden upon interstate commerce.

In *Sherlock* v. *Alling, supra,* Mr. Justice Field, in delivering the opinion of the court, said (page 103):

"In conferring upon Congress the regulation of commerce, it was never intended to cut the States off from legislating on all subjects relating to the health, life and safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

In that case a statute of Indiana, giving a right of action to the personal representatives of the deceased, where his death is caused by the wrongful act or omission of another, and providing "for the better security of the lives of passengers on board of vessels," was said to be constitutional and no encroachment upon interstate commerce as fixing the liability for injuries caused by colliding boats, both of which were engaged in interstate commerce.

In *Crutcher* v. *Ky., supra,* we find this language used by Mr. Justice Bradley, who delivered the opinion in that case (page 61):

"It is also within the undoubted province of the State Legislature to make regulations with regard to the speed of railroad trains in the neighborhood of cities and towns; with regard to the precautions to be taken in the approach of such trains to bridges, tunnels, deep cuts and sharp curves; and, generally, *with regard to all operations in which the lives and health of people may be endangered, even though such regulations affect to some extent the operations of interstate commerce.* Such regulations are eminently local in their character, and in the absence of congressional regulations over *the same subject,* are free from all constitutional objections, and unquestionably valid." (Italics are ours.)

In *Nashville, etc., R. R.* v. *Alabama, supra,* the same learned judge, in delivering the opinion of this court, said (page 99):

"It is conceded that the power of Congress to regulate interstate commerce is plenary; that, as incident to it, Congress may legislate as to the qualifications, duties and liabilities of employees and others on railroad trains engaged in that commerce; and that such legislation will supersede any State action on the subject. But until such legislation is had it is clearly within the competency of the States to provide against accidents whilst within their limits. Indeed, it is a principle fully recognized by decisions of State and Federal courts, that wherever there is any business in which, either from the products created or the instrumentalities used, *there is danger to life or property,* it is not only within the power of the State, but is among their *plain duties,* to make provisions against accidents likely to follow in such business, so that the dangers attending it may be guarded against so far is it is practicable. (Italics are ours.)

"Legislation which is a mere aid to commerce may be enacted by a State, although at the same time it may incidentally affect interstate commerce. Citing *Mobile County* v. *Kimball,* 120 U. S. 691."

This court, in *Chicago, Milwaukee, etc., R. R. Co.* v. *Solan, supra,* discussing the power of the State to pass laws, which may indirectly and incidentally affect interstate commerce, says:

"It is equally within the power of the State to prescribe the safeguards and precautions foreseen to be necessary and proper to

prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the State has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, within themselves, regulations of interstate commerce, although they control, in some degree, the conduct and the liability of those engaged in such commerce."

In *Hennington* v. *Georgia, supra,* it was held that a statute of Georgia forbidding the running of freight trains on any railroad within the State on Sunday, although it affects interstate commerce, in a limited degree, was not for that reason a needless intrusion upon the domain of Federal jurisdiction. That it is not invalid as being repugnant to the Constitution of the United States, and must be respected in the courts of the Union until superseded and displaced by some act of Congress, passed in execution of the power granted it under the Constitution.

The defendant in that case was the superintendent of transportation of a railroad which was engaged in interstate commerce, operating in the States of Alabama, Mississippi, Tennessee and Georgia.

After reviewing the authorities on the question, Mr. Justice Harlan, who delivered the opinion of the court, sustained the State legislation in the following language (pages 317, 318):

"These authorities make it clear that the legislative enactment of the States, passed under their admitted police powers, and having a real relation to the domestic peace, order, health and safety of their people, but which, by their necessary operation, affect to some extent, or for a limited time, the conduct of commerce among the States, are yet not invalid by force alone of the grant of power to Congress to regulate such commerce; and, if not obnoxious to some other constitutional provision or destructive of some right secured by the fundamental law, are to be respected by the courts of the Union until they are superseded and displaced by some act of Congress passed in execution of the power granted to it by the Constitution. Local laws of the character mentioned have their source in the pow-

ers which the States reserved and never surrendered to Congress, of providing for the public health, the public morals, and the public safety, and are not, within the meaning of the Constitution, and considered in their own nature, regulations of interstate commerce simply because, for a limited time or to a limited extent, they cover the field occupied by those engaged in such commerce. The statute of Georgia is not directed against interstate commerce. It establishes a rule of civil conduct applicable alike to all freight trains, domestic, as well as interstate. It applies to the transportation of interstate freight the same rule precisely that it applies to the transportation of domestic freight. And it places the business of transporting freight in the same category as all other secular business. It simply declares that, on and during the day fixed by law as a day of rest for all the people within the limits of the State from toil and labor incident to their calling, the transportation of freight shall be suspended.

"We are of the opinion that such a law, although in a limited degree affecting interstate commerce, is not for that reason a needless intrusion upon the domain of Federal jurisdiction, nor strictly a regulation of interstate commerce, but, considered in its own nature, is an ordinary police regulation designed to secure the well-being and to promote the general welfare of the people within the State by which it was established, and, therefore, not invalid by force alone of the Constitution of the United States."

The same learned judge, in the opinion rendered in *L. S. & M. S. Ry. Co.* v. *Ohio, supra,* says:

"This power of the States (referring to the power to regulate the rights and duties of all persons within its jurisdiction, to provide for the public convenience and public good) is entirely distinct from any power granted to the general government, although when exercised it may sometimes reach subjects over which National legislation can be constitutionally extended. When Congress acts with reference to a matter conferred to it by the Constitution, then its statutes displace all *conflicting local regulations* touching that matter, although such regulations may have been established in pursuance of a power not surrendered by the States to the general Government." (Matter in parenthesis and italics is ours.)

In *Western Union Telegraph Co.* v. *Kansas, supra,* we find a very recent expression of this court upon the power of a State to pass such laws as the one whose constitutionality is now in question.

Justice Harlan, who wrote the opinion of the court in that case, uses this language:

"This has been done without violating the principle that a common carrier entering a State for purposes of its business, is subject to local regulations, that, in their essence and purpose, only incidentally affect interstate commerce, but are established in good faith for the protection, safety and comfort of the people, are not in themselves in any real, just sense an obstruction to, or in conflict with, the substantial rights of those engaged in interstate commerce, but are referable to the police powers of the State, and are to be respected until Congress covers the subject by legislation. (Citing cases)."

In the case of *Asbell* v. *Kansas, supra,* this court, after affirming the right of the State of Kansas to pass inspection laws, the object of which was to exclude from said State cattle infected with contagious, infectious or commuicable disease, even though "it may have had an incidental and indirect effect upon commerce between the States," said:

"The cause, however, can not be disposed of without inquiring whether there was, at the time of the offense, any legislation of Congress *conflicting* with the State law. If *such* legislation was in existence, the State law, so far as it affected interstate commerce, would be compelled to yield to its supreme authority." (Italics are ours.)

In the case of *M., K. & T. Ry. Co.* v. *Haber, supra* which was also a cattle inspection case, the court said:

"May not these statutory provisions stand without obstructing or embarrassing the execution of the act of Congress? This question must of course be settled with reference to the settled rule that a statute enacted in execution of a reserved power of the State is not to be regarded *as inconsistent* with an act of Congress passed in the execution of a clear power under the Constitution, *unless the repugnance or conflict is so direct and positive that the two acts can not be reconciled or stand together.*" (Italics are ours.)

And in the same case the court further said:

"These cases all proceed upon the ground that the regulation of the enjoyment of the relative rights and the performance of the duties of all persons within the jurisdiction of a State belong primarily to such State under its reserved powers to provide for the safety of all persons and property within its limits; and that even if the subject of such regulations be one that may be taken under the exclusive control of Congress, and be reached by National legislation, any action taken by the State upon that subject that does not *directly interfere* with rights secured by the Constitution of the United States, or by some valid act of Congress, must be respected *until Congress intervenes.*" (Italics are ours.)

In *G., C. & S. F. Ry. Co.* v. *Hefley, supra,* the same thought was thus expressed:

"Generally, it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislate upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the Nation."

In *C., R. I. & P. Ry. Co.* v. *Arkansas, supra,* this court had under consideration an act of the Legislature of Arkansas requiring all railroads operating a line more than fifty miles in length, to maintain a crew of a certain number of men for the operation of all freight trains of twenty-five cars or more. This court held that, as applied to an interstate train, this regulation of the State of Arkansas did not amount to an unconstitutional burden upon commerce between the States. Mr. Justice Harlan, who delivered the opinion of the court, said:

"The statute here involved is not in any proper sense a regulation of interstate commerce."

We believe the cases from which we have quoted amply sustain the validity of the present act. Congress, in the exercise of its

power to regulate commerce between the States, has not seen fit to provide regulations governing what we are pleased to term "interstate peddling."

There are many reasons for this failure of Congress to legislate on the subject-matter. What would be a reasonable regulation in one part of the country would not be in another. In crowded urban districts one sort of regulation might be desired, while in sparsely settled rural communities quite a different regulation might be deemed proper. With some classes of peddlers a closer and more strict regulation is desired than with others, the nature of the regulation depending not only upon the character of the articles peddled, but also upon the manner in which the peddling is done and the localities affected. It would be quite impossible for the Congress to adopt a general scheme of regulation which would be efficient in all parts of the country. This fact must have been recognized by the Congress, hence its failure to legislate upon the subject, thereby leaving free and untrammeled, the several State Legislatures. A State law regulating peddling, therefore, being, in its very nature, an exercise of the police power, where no provision of the fundamental law is violated and where there has been no unjust classification, discriminating in its effects, should be upheld as an act of State sovereignty and as peculiarly within the province of the State.

As seen from the opinion below, the judgment of the Supreme Court of Arkansas was largely placed upon the decision of this court in *Emert* v. *Missouri, supra.* In discussing that case, we can do no better than copy from the opinion of the Supreme Court of Arkansas:

"The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute.

This definition varies from the common law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words 'peddle' and 'sell' are used synonymously, but in order to come within the terms of the statute it is essential that the sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be added the element of traveling from place to place, over and through the county, for the purpose of selling, in order for the statute to reach it. It should also be especially noted that the statute does not discriminate against nonresidents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description.

"The opinion of the Supreme Court of the United States, delivered by Mr. Justice Gray in *Emert* v. *Missouri*, 156 U. S. 296, announces the law applicable to the case and sustains the views we express. In that case, the agent of a nonresident manufacturer of sewing machines was engaged in peddling machines in Missouri without obtaining a license as required by the statute of that State. He asserted his right to sell free of license, on the ground that the transaction constituted interstate commerce. All of the prior decisions are reviewed and the following conclusions announced:

"The statute in question is not part of a revenue law. It makes no discrimination between residents or products of Missouri and those of other States; and manifests no intention to interfere, in any way, with interstate commerce. Its object, in requiring peddlers to take and pay for licenses, and to exhibit their licenses, on demand, to any peace officer, or to any citizen householder of the county, appears to have been to protect the citizens of the State against the cheats and frauds, and even thefts, which as the experience of ages has shown, are likely to attend itinerant and irresponsible peddling from place to place and from door to door. * * * The necessary conclusion, upon authority, as well as upon principle is that the statute of Missouri, now in question, is nowise repugnant to the power of Congress to regulate commerce among the several States, but is a valid exercise of the power of the State over persons and business within its borders.

"It is true in that case the vendor carried the machines with him from place to place, and made deliveries as he sold them. But we can not see that that alters the principle, for the Legislature has

the power to define the act of peddling, and that definition should be upheld by the courts unless it is manifestly evasive."

In *Barnhill* v. *State, supra,* the Supreme Court of Arkansas, further discussing the validity of the act in question, referred to the decisions of this court sustaining State statutes requiring that notes, otherwise negotiable, the consideration for which is a patent right or a patented article, should be executed in the prescribed manner or otherwise be invalid. We quote from the opinion in the *Barnhill Case* as follows:

"It has been held by the Supreme Court of the United States that State statutes requiring that notes otherwise negotiable instruments, the consideration for which is a patent right or patented article, should be executed in a prescribed manner or otherwise be invalid as negotiable paper or even void, are not in contravention of any provision of the Federal Constitution or of any power given to Congress to legislate relative to the subject-matter of such transactions. This ruling is based upon the ground that such State legislation is but the exercise of the police power of the State in the protection of its citizens against fraud and imposition which common experience has shown can be more readily perpetrated in cases where the sale of patent rights and patented articles is the subject-matter of the transaction. Allen v. Riley, 203 U. S. 347; Woods v. Carl, 203 U. S. 358; Ozan Lumber Co. v. Union Co. Bank, 207 U. S. 251.

"In the latter case it is said: 'The various itinerant venders of patented articles, whose fluency of speech and carelessness regarding the truth of their representations might almost be said to have become proverbial, were of course in the mind of the Legislature and were included in this legislation. Indeed, they are the principal people to be affected by it.'

"In the latter case the transaction involved a contract of sale concerning a matter which was the subject of interstate commerce and while the question as to whether or not such State legislation relative to patent notes was affected by reason of the fact that the patented article sold was shipped in interstate commerce was not expressly passed on in the opinion rendered by the Federal Supreme Court, it does appear to have met the attention of the United States Circuit Court of Appeals in that case and is there noted. Union

Co. Bank v. Ozan-Lumber Co., 179 Fed. 710. But in those cases this character of legislation is recognized as a valid police regulation enacted by the State for the peace and security of its citizens. The peddling statute of this State we think is that character of legislation and is for that reason valid."

We think the analogy is clear which the Supreme Court of Arkansas has drawn between the present case and the line of decisions sustaining the right of the State to regulate, the execution of notes given for patent rights or patented articles.

We desire to especially call the court's attention to the fact that the police regulation of the State of Arkansas affecting stove peddlers does not discriminate against products of foreign States or in favor of products of Arkansas, nor does it discriminate against residents of foreign States nor in favor of residents of Arkansas. It applies uniformly and alike upon all stove peddlers, whether they be citizens of Arkansas or citizens of other States, and whether they represent resident or nonresident principals.

It is believed that no provision of the Constitution of the United States has been assailed by the Legislature of Arkansas, and it is not contended by counsel in their brief in this case that the act in question contravenes the Fourteenth Amendment. The entire argument is directed at the proposition we have been discussing and it is insisted that the statute is void because repugnant to the commerce clause of the Constitution. We believe that such is not the case. In so far as the statute affects commerce at all it is remote and indirect, and in view of the previous decisions of this court, it can not be said that the "peddling act" of Arkansas is in any just sense a regulation of, or a burden upon commerce between the States.

III.

THE INSTANT CASE MAY BE CLEARLY DISTINGUISHED FROM THE CASES CITED AND RELIED UPON BY PLAINTIFF IN ERROR.

From the authorities cited and discussed in the preceding subdivision of this brief, it is clear that the State has the right, in exercising here police power, to pass many statutes which indirectly and remotely affect interstate commerce, but which have been upheld in many instances by this court as being in no just sense a regulation of or burden upon commerce between the States.

The act which is now before the court being, as we have seen, a reasonable exercise of the police power and not discriminating between the products or manufactured articles of the several States, must be upheld unless its operation as applied to the facts in this case make it a burden upon interstate commerce.

This case is to be distinguished from a number of cases heretofore decided by this court and cited and relied upon by plaintiff in error in this: The statutes condemned in the previous adjudications of this court, it is believed, have practically all been statutes passed by States in the exercise of their taxing power. These statutes have been condemned by this court because they either amounted to a tax upon property which was a subject of interstate commerce, or a tax upon the sale, or offer to sell of articles situated in another State from that where the tax was demanded and which were afterwards to be transported to the taxing State, thereby becoming a part and parcel of interstate commerce.

An examination of the cases, it is believed, will show that in nearly every instance the statute condemned as construed by the

State courts operated as a tax either upon the property itself or upon the sale or offer to sell the same. In each instance the taxing power of the State had been sought to be exercised either upon articles that formed a part of interstate commerce or upon the sale or offer to sell of articles which were intended to become a part of interstate commerce. Thus the State placed a tax upon interstate commerce and by statute attempted to regulate and burden such commerce.

In the instant case the statute is not a taxing statute, but a police regulation merely, intended to protect the citizens from cheats and frauds, and the State's authority to pass such a statute has been many times recognized by this court. As we have attempted to show before, there was no attempt to regulate interstate commerce or to *levy a tax* of any kind. It is true a license fee is demanded, but not for the purpose of raising revenue, but as a police regulation. The situation which the Legislature of Arkansas attempted to regulate and to police was an internal situation—the regulation of a pursuit and occupation which has since the days of the Common Law been regarded as one peculiarly within the province of the State to regulate.

Speaking of the sort of peddling to which the Arkansas statute refers, the Pennsylvania court, in *Titusville* v. *Brennan,* said:

"He comes into this State, according to the case stated, in order that he may here engage in the business of going from house to house to sell frames and pictures for a dealer who resides in another State. He hunts his customers at their own homes. To the inmates of the homes in which he intrudes himself he exhibits what he alleges to be a sample of the goods he is to supply. The only apparent difference between him and the ordinary pack peddler is that the peddler produces the precise article he offers for sale, and delivers it to the purchaser on the spot; while the defendant produces from his pack a sample. The customer relies on his assurance that it will be like it, and the article is subsequently delivered by some itinerant, or by express, if it is ever delivered at all. There

is in each case the same intrusive domiciliary visitation; the same relentless personal pursuit of a purchaser; the same practical and insistent itinerant salesman adroitly pressing his wares on the attention of those who neither need nor wish them, but who are unable to resist the wiles or penetrate the deceptions practiced upon them. The business of both is, in general character, the same."

This case afterwards came to this court, when the judgment of the lower court was reversed (153 U. S. 289), this court holding that the statute as applied to the facts in that case amounted to a regulation of, and burden upon interstate commerce. The statute under consideration in that case was very different from the act of Arkansas. It was a revenue measure and was so recognized by this court.

The decision in *Brennan* v. *Titusville, supra,* seems to have been based upon the ground that the State had exceeded her power of taxation and that the tax in question could not be collected because it amounted to tax upon interstate commerce. Mr. Justice Brewer, speaking for the court as to the nature of the act, said:

"This license does not purport to be exacted in the exercise of the police but rather of the taxing power."

And further in the case:

"The license, therefore, the failure to take out which is the offense complained of and for which the defendant was sentenced, is a license for 'general revenue purposes' within the very declaration of the ordinance."

While it is true that there are limits even in the exercise of the police power and a point beyond which the State may not go without coming into conflict with the Federal Constitution, yet it is thoroughly established that an act passed in pursuance of the police power will not be declared void because it indirectly affects interstate

commerce. This court in *Brennan* v. *Titusville* recognized the authority of the State in the exercise of its police powers and said:

"It is undoubtedly true that there are many police regulations which do affect interstate commerce, but which have been and will be sustained as clearly within the power of the State."

The ordinance condemned in that case provided for the payment of a license by "*all persons,* canvassing or soliciting within said city orders for goods, books, pictures, etc., or persons delivering such articles under orders so obtained or solicited."

It is thus seen that the ordinance differs from the law of Arkansas in two particulars; first, it is a revenue measure, and, second, it does not apply *only* to peddlers, a class of persons coming peculiarly under the purview of the police power, but, upon the other hand, it applies to *any and all persons* who canvass or solicit, or deliver articles upon orders previously obtained.

The case of *Robbins* v. *Shelby Co. Taxing Dist.,* 120 U. S. 489, may be easily distinguished from the case at bar. The statute, the validity of which was drawn in question in that case, was an act relating to the subject of taxes. It was therefore an exercise of the taxing power and not the police power, and in that important particular it is different from the Arkansas act. The statute there under consideration provided that "all drummers and all persons not having a regular licensed house of business in the taxing district, *offering for sale or selling goods, wares, etc.,* by sample shall be required to pay" a certain sum for such privilege. That statute did not apply to *peddlers only,* who have long been recognized as a separate class, and as such class subject to the control of the State in the exercise of its police power.

The Tennessee statute was a tax imposed upon the privilege of selling or offering for sale, regardless of the manner of such sale, or the fact that the goods sold or offered to be sold, were in another State and that the transaction was an interstate transaction. It provided a tax upon the sale, and as such it was void as applied to interstate transactions. In that case Chief Justice Waite, in a learned dissenting opinion, said:

"I can hardly believe it would be contended that the provisions of the same statute now in question which fixes a license fee for all peddlers in the district would be held to be unconstitutional in its application to peddlers who came with their goods from another State and expected to go back again."

As said by the Supreme Court of Arkansas in the opinion below:

"*Robbins* v. *Shelby County Taxing District*, 120 U. S. 489, and the line of similar cases in that court, concerned statutes and ordinances imposing license fees on drummers who solicited orders for nonresident merchants, and such legislation was declared to be a burden on interstate commerce. Here no such burden is imposed for the license is not demanded merely for soliciting orders but for peddling."

And at another place in the opinion below, the Supreme Court of Arkansas, in discussing the evils sought to be remedied by this statute, said:

"The statute is directed against peddling, and undertakes to define what constitutes peddling within the meaning of the statute. This definition differs from the common law definition of peddling, in that it is not essential that the vendor deliver his wares at the time he makes sales thereof in order to come within its terms. In the statutory definition the words 'peddle' and 'sell' are used synonymously, but in order to come within the terms of the statute it is essential that a sale must be by one traveling over and through the county. The statute does not reach to mere sales. In other words, one who simply brings his wares into a county and sells them does not fall within the statute. There must be the element of traveling

from place to place, over and through the county, for the purpose of selling, in order for the statute to reach to it. It should also be especially noted that the statute does not discriminate against non-residents of the State or of any county, nor against the wares manufactured without the State. It applies to all alike which fall within the description."

In *Dozier* v. *Ala.*, 218 U. S. 124, the act condemned provided for the payment of a tax by all persons who solicit orders for the enlargement of photographs or pictures of any character, or for picture frames, except those having a permanent place of business in the State. *This was not a peddling act.* It attempted to regulate directly all sales and offers to sell, and hence, as applied to interstate transactions, it was void.

Leisy v. *Hardin*, 135 U. S. 100, arose under a statute prohibiting the sale of intoxicating liquor without license. The decision was rendered before the passage of the Wilson act and this court held that, as applied to imported goods sold in original packages, it was a burden on interstate commerce. In that case it was made a violation of law to sell without a license. It is not so with the Arkansas statute. It is no violation of the law to sell stoves and ranges without the payment of a license. *It is*, however, a violation of the Arkansas statute to engage in the occupation of peddling stoves and ranges without the payment of a license. In that respect the instant case may be distinguished from *Leisy* v. *Hardin, supra:*

The case of *Asher* v. *Texas*, 128 U. S. 129, merely follows the case of *Robbins* v. *Shelby County Taxing District, supra*, it being said by the court that there was no difference between the two cases. The act before the court in the *Asher case* being in all respects similar to the Tennessee act condemned in the *Robbins case*. Neither were acts regulating the business of peddling, but were revenue

acts providing for the payment of a special tax for the privilege of selling and offering to sell by sample.

In the case of *Welton* v. *Missouri*, 91 U. S. 275, the statute was condemned by this court because it discriminated between the products of Missouri and the products of other States. Thus it amounted to a burden upon interstate commerce in that it required the payment of a tax by those who imported the products of other States and sold the same in Missouri, and did not require such tax upon those who sold domestic products.

The case of *Crutcher* v. *Kentucky*, 141 U. S. 47, has no direct application to the question now before the court. In that case it was held (quoting from the syllabus):

"The act of the Legislature of Kentucky of March 2, 1860, 'to regulate agencies of foreign express companies,' which provides that the agent of an express company not incorporated by the laws of that State shall not carry on business there without first obtaining a license from the State, and that, preliminary thereto, he shall satisfy the Auditor of the State that the company he represents is possessed of an actual capital of at least $150,000, and that if he engages in such business without license he shall be subject to fine, is a regulation of interstate commerce so far as applied to a corporation of another State engaged in that business, and is, to that extent, repugnant to the Constitution of the United States."

In *Stockard* v. *Morgan*, 185 U. S. 27, the statute under consideration was a revenue measure providing for the payment of a privilege tax and as applied to the facts in that case it was held void as coming within the rule laid down in the case of *Robbins* v. *Shelby County Taxing District*. This statute was not a police regulation and it did not apply to a separate class of persons such as peddlers.

In *Caldwell* v. *North Carolina*, 187 U. S. 622, a city ordinance provides that "*every person* engaged in the business of selling or

delivering picture frames, photographs or likenesses of the human face, in the city of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of $10 for each year."

This statute was also a revenue statute and as applied to the facts in that case was unconstitutional and void as a tax directly upon interstate commerce.

In *Rearick* v. *Pennsylvania*, 203 U. S. 507, the ordinance does not appear to have been a peddling ordinance. It provided for the payment of a tax by any one who solicited orders, who sold or delivered at retail either on the streets or by traveling from house to house, any goods not of the parties' own manufacture or production. This ordinance was not directed at the business of peddling. There was no attempt upon the part of the State to regulate that class of itinerant vendors, but it provided for a tax upon the sale or offer to sell of goods, wares or merchandise. As such it was held to be invalid when applied to one who solicited orders which were transmitted to a foreign State where the goods were applied to the orders and forwarded to an agent of the shipper who made the deliveries.

The case of *Leloup* v. *Port of Mobile*, 127 U. S. 640, like the case of *Crutcher* v. *Ky.*, *supra*, arose under a statute which directly affected and burdened interstate commerce. There is no close application between the principles therein decided and the principles here involved.

The case of *Brown* v. *Maryland*, 12 Wheaton, 419, involved the validity of a statute imposing the payment of a tax upon all im-

ports. The statute was a revenue measure and amounted to a tax directly upon interstate commerce. It was not an internal regulation and as such a competent exercise of the police power, but was an attempt by Maryland to tax articles and the sale of articles which were subjects of interstate commerce.

In conclusion, we respectfully submit that the act in question is not repugnant to the commerce clause of the Constitution of the United States, but that it is a valid and proper exercise of the police power which the State has never surrendered.

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